DOCKET

No. 86-1294-CFX
Status: GRANTED

Title: William H. Webster, Director of Central Intelligence, Petitioner
v.
John Doe

Docketed:
February 6, 1987

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Lynch,Mark H.

Entry	Date	Note	Proceedings and Orders
1	Dec 24 1986		Application for extension of time to file petition and order granting same until February 6, 1987 (Chief Justice, December 31, 1986).
2	Jan 23 1987		Application for further extension of time to file petition denied (Chief Justice, January 29, 1987).
3	Feb 6 1987	G	Petition for writ of certiorari filed.
4	Feb 6 1987		Appendix of petitioner Gates, Acting Dir., CIA filed.
6	Feb 27 1987		Order extending time to file response to petition until April 8, 1987.
7	Apr 8 1987		Brief of respondent John Doe in opposition filed.
8	Apr 22 1987		DISTRIBUTED. May 14, 1987
9	Apr 22 1987		REDISTRIBUTED. May 14, 1987
10	Apr 30 1987	X	Reply brief of petitioner Gates, Acting Dir., CIA filed.
11	May 4 1987		Letter from Solicitor General received and distributed.
13	May 18 1987		REDISTRIBUTED. May 21, 1987
14	May 18 1987		REDISTRIBUTED. May 21, 1987
16	May 26 1987		REDISTRIBUTED. May 28, 1987
19	Jun 1 1987		REDISTRIBUTED. June 4, 1987
21	Jun 8 1987		Petition GRANTED.
			**********
23	Jul 24 1987		Order extending time to file brief of petitioner on the merits until August 22, 1987.
24	Aug 13 1987		Record filed.
26	Aug 21 1987		Joint appendix filed.
25	Aug 22 1987		Brief of petitioner Gates, Acting Dir., CIA filed.
28	Sep 2 1987		Order extending time to file brief of respondent on the merits until October 23, 1987.
29	Sep 2 1987		Record filed.
30	Oct 14 1987		Order further extending time to file brief of respondent on the merits until November 4, 1987.
33	Nov 3 1987		Brief amici curiae of NOGLSTP, et al. filed.
31	Nov 4 1987		Brief of respondent John Doe filed.
32	Nov 4 1987		Brief amici curiae of Employment Law Center, et al. filed.
34	Nov 20 1987		CIRCULATED.
35	Nov 23 1987		SET FOR ARGUMENT. Tuesday, January 12, 1988. (1st case).
36	Dec 31 1987		Lodgings received.
37	Dec 31 1987	X	Reply brief of petitioner Gates, Acting Dir., CIA filed.
38	Jan 12 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1294

No.

Supreme Court, U.S.
FILED
FEB 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE,
PETITIONER

v.

JOHN DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the decision of the Director of Central Intelligence to discharge an officer or employee of the Central Intelligence Agency pursuant to the Director's authority under Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), is judicially reviewable under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701-706.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE,
PETITIONER

v.

JOHN DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Robert M. Gates, Acting Director of Central Intelligence, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-55a) is reported at 796 F.2d 1508. The opinion of the district court (App. 59a-78a) is reported at 601 F. Supp. 581.

JURISDICTION

The judgment of the court of appeals (App. 79a-80a) was entered on August 1, 1986. A petition for rehearing was denied on October 9, 1986 (App. 81a). On December 31, 1986, the Chief Justice extended the time within which to file a petition for a writ of certi-

orari to and including February 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), provides as follows:

> Notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the Director of the Office of Personnel Management.

2. The Administrative Procedure Act, 5 U.S.C. 701, provides, in pertinent part, as follows:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

STATEMENT

A. Background

This case stems from a decision by the Director of Central Intelligence to discharge an employee, respondent John Doe,[1] after his nine-year career with

[1] Respondent has at all times proceeded under a pseudonym because his status as a CIA employee cannot be publicly acknowledged.

the Central Intelligence Agency (CIA or Agency).[2] Respondent began work as a clerk-typist, but he was eventually promoted, after training, to a covert position as an electronics technician. Periodic fitness reports consistently rated respondent as an excellent or an outstanding employee, and the CIA had not expressed dissatisfaction with respondent's work or loyalty. App. 3a.

On January 28, 1982, respondent voluntarily informed an Agency security officer that he was a homosexual. As a result, the CIA placed respondent on paid administrative leave beginning on February 2, 1982, pending an investigation. On February 12 and 17, respondent was interviewed at length by a polygraph officer about his homosexuality and his risk to security. The officer later informed respondent that his test responses were truthful, including his statement that he had not had sexual relations with foreign nationals and that he had not disclosed classified information to any sexual partners. App. 3a-4a.

The polygraph officer prepared a factual report based on the interviews. Respondent was allowed to review the report, and he prepared a supplement. On April 14, a CIA security officer informed respondent that the Agency's Office of Security had determined that the circumstances of his homosexuality posed a security threat, but refused to elaborate. Respondent maintained that he had received conflicting

[2] The facts are discussed in the opinions of the courts below. At this stage of the case, the facts are undisputed. The Agency did not contest respondent's factual assertions. Instead, the Agency stated only that respondent's assertions were not material insofar as they were inconsistent with the Agency's own statement of material facts not in dispute (C.A. App. 42).

explanations about the Agency's policy towards homosexuals. Two security officers had told respondent that his homosexual activities violated Agency regulations, but the CIA then-Deputy General Counsel told respondent's attorney that homosexuality was a security concern that did not inevitably result in dismissal. Rather, according to the then-Deputy General Counsel, the Agency considered this a security concern that would be evaluated on a case-by-case basis. App. 4a.

On April 14, respondent was asked to resign, but he refused. The Office of Security ultimately recommended to the Director that respondent be dismissed. Respondent's counsel submitted a letter requesting that respondent be retained, but respondent's attorney later received a letter from the then-Deputy General Counsel stating that the Director had reviewed respondent's case and concluded that it was "'necessary and advisable in the interests of the United States'" to dismiss respondent from the Agency (App. 5a (quoting C.A. App. 31)). Respondent was told that the Agency would give a positive recommendation to any prospective employer. Respondent was also informed that if he applied for a job requiring a security clearance, the Agency would inform the prospective employer that he had been dismissed because his homosexuality posed a security threat. A member of the General Counsel's staff also informed respondent that he was required to inform the Agency if he applied for a job requiring a security clearance. App. 5a-6a.

B. The Proceedings Below

1. Respondent brought suit against petitioner in the United States District Court for the District of Columbia. Respondent alleged that the CIA had dismissed him because of his homosexuality and that his

discharge violated the First, Fourth, Fifth, and Ninth Amendments; the Administrative Procedure Act (APA), 5 U.S.C. (Supp. III) 702; 28 U.S.C. 1361; and Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c) (C.A. App. 46). Respondent sought a declaratory judgment that his dismissal was unlawful and an injunction requiring the CIA to reinstate him to his former position (*id.* at 54). In the alternative, he sought reinstatement to administrative leave, reconsideration of his security suitability for employment with the Agency, and a variety of procedural rights, such as a statement of the reasons for any future dismissal and an opportunity to contest any adverse final determination (*ibid.*).

Respondent filed a motion for summary judgment, which the district court granted in part (App. 59a-78a). The court ruled that respondent had been unlawfully discharged, because the CIA did not follow its own regulations in dismissing him (*id.* at 70a-74a). The court also denied petitioner's motion to dismiss respondent's complaint on the ground that Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), precluded judicial review of petitioner's decision under the APA, 5 U.S.C. (& Supp. III) 701-706 (App. 74a-77a). The court did not address respondent's substantive constitutional claims, given its ruling in his favor on procedural grounds (*id.* at 77a).

2. a. By a divided vote, the court of appeals vacated the district court's judgment and remanded the case for further proceedings (App. 1a-33a). At the outset, the court ruled that Section 102(c) of the National Security Act of 1947 did not "preclude judicial review" under Section 10(a)(1) of the APA, recodified as 5 U.S.C. 701(a)(1), of the Director's decision to dismiss an employee (App. 9a-14a). It found that nothing in the text or legislative history

of Section 102(c) expressly precludes judicial review, and noted "most importantly" that Section 102(c) provides a standard governing the Director's decision and the courts' review—*i.e.*, whether dismissal is "necessary or advisable in the interests of the United States" (App. 12a). The court found that no statutory "framework" or "scheme" would be disrupted by judicial review of the Director's decision to dismiss a CIA employee (*ibid.*), and concluded that, while Congress had intended to impose a different and more relaxed standard of review than the one governing most federal employees,[3] Congress did not intend to bar review altogether (*id.* at 13a).

The court also held that Section 102(c) did not "commi[t] to agency discretion" under Section 10(a)(2) of the APA, recodified as 5 U.S.C. 701(a)(2), the decision whether to dismiss a CIA employee (App. 15a-19a). The court explained that the statutory standard did not offer "'absolutely no guidance'" as to how the Director may exercise his discretion, and undoubtedly prohibited discharge for an invalid reason, such as race or hair color (*id.* at 16a). In addition, the court ruled that, while the courts could not second guess the wisdom of the Director's decisions, the courts could and must "satisfy [themselves]" that the Director's decisions bear "*some* relationship to the interests of the United States" to ensure that the Director did not base his decision on an impermissible factor (*id.* at 17a (emphasis in original)).

The court then turned to the merits of respondent's claims. It first determined that the Agency did not

[3] The court noted the reference in Section 102(c) to the more rigorous statutory provisions allowing termination of most federal employees "only for such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)) (App. 13a).

violate its regulations in dismissing respondent (App. 19a-23a). The court then held, noting that the language of Section 102(c) left "the decision to terminate * * * largely to the expertise and judgment of the Director" (App. 24a), that its review should be under an arbitrary and capricious standard. Looking to the actions taken in this case (*id.* at 23a-32a), the court stated that there were three possible explanations for the Director's decision: First, the Director may have intended to invoke Section 102(c) without giving any reasons at all for discharging respondent. Second, the Director may have intended to discharge respondent as part of a ban against the employment of all homosexuals. And third, the Director may have discharged respondent because *his* homosexuality presented a security risk (App. 25a). While the court found two of these explanations did not justify further judicial review,[4] it found that the second possible explanation—that respondent was dis-

[4] Although the court found it "unlikely" that respondent was discharged for reasons having nothing to do with his homosexuality (App. 25a), it ruled that, if the district court found that to be true and "the Director intended to invoke section 102(c) without reasons in this case," respondent could not challenge the Director's decision to dismiss him (App. 26a).

The court stated further that if the district court found respondent to have been dismissed because *his* homosexuality posed a security risk, respondent would have an arguable claim that the Agency had unlawfully deprived him of a liberty interest in past or future employment by damaging his reputation. Such action would require that he receive an opportunity "to refute the charges and 'clear his name'" (App. 31a (footnote omitted)). In that event, however, respondent's claims would also fail, because the Agency had provided him with a meaningful opportunity to contest any allegation that his homosexuality posed a security risk (*id.* at 31a-32a).

charged because of a CIA policy barring the employment of all homosexuals—would give rise to an arguable claim that respondent's discharge was unlawful (*id.* at 27a).[5] The court did not decide which scenario had in fact occurred, however, but instead remanded the case to the district court for further proceedings (*id.* at 32a).[6]

b. Judge Buckley dissented from the majority's ruling that the Director's decision to dismiss a CIA employee was subject to review under the APA (App. 34a-55a).[7] Looking to both the language and the legislative history, he found a clear intention to preclude review under Section 10(a)(1) of the APA (App. 35a-45a). When Section 102(c) was enacted, federal personnel actions were not subject to judicial review (App. 39a-40a). Accordingly, the fact that Section 102(c) imposed a different substantive standard for removal (substituting the language "necessary or advisable in the interests of the United States" for "such cause as will promote the efficiency of [the] service") did not suggest that Congress contemplated judicial review of the Director's decisions (App. 40a). This was particularly true, Judge Buckley explained, since the opening clause of Section 102(c)—"[n]otwithstanding the provisions of [the Lloyd-LaFollette Act], or the provision of any other law"—also deprived CIA employees of all procedural protections in the administrative process (such as notice of the charges and an opportunity to respond) that were available to other federal employees (App. 40a-41a). Accordingly, Congress could not have intended to allow CIA employees to obtain through judicial review procedures they were denied in the administrative process (*id.* at 41a).

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[5] If the district court found that to be true, the court explained, respondent would have an *"arguable"* constitutional claim, because *Bowers* v. *Hardwick*, No. 85-140 (June 30, 1986), and *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984), did not address discrimination on the basis of homosexual orientation, rather than homosexual conduct (App. 27a (emphasis in original)). In any event, the Director would have to justify why such a policy was " 'necessary or advisable in the interests of the United States' " (*ibid.*).

[6] Judge Ginsburg joined the majority opinion but also wrote a brief separate concurrence (App. 33a).

[7] Judge Buckley concurred in the majority's rulings that the CIA did not violate its own regulations in discharging respondent and that respondent had not been deprived of a liberty interest without due process (App. 34a).

Judge Buckley further pointed out (App. 41a-43a) that the majority misread the statute as imposing an objective requirement applicable by a court, when, in fact, it authorizes action "*whenever* [*the Director of Central Intelligence*] *shall deem* such termination necessary or advisable in the interests of the United States" (emphasis added). Thus, properly construed, Section 102(c) requires only that the Director be satisfied as to the necessity or advisability of the action. In addition, Judge Buckley found that the statutory objectives of Section 102(c) and the nature of the administrative action involved strongly militated in favor of precluding judicial review (App. 43a-46a). Congress's obvious purpose in exempting the Director of the CIA from normal civil service requirements, he concluded, was to allow him "unimpeded" control over personnel as a "natural and necessary function of the extraordinary sensitivity that surrounds every aspect of our national security operations" (*id.* at 43a-44a).

For similar reasons, Judge Buckley found that Section 102(c) committed to the Director's discretion under 5 U.S.C. 701(a)(2) the decision whether to dismiss a CIA officer or employee (App. 46a-52a).

"One obvious purpose" of Section 102(c) "is to allow the Director to act upon unsubstantiated impressions 'when he shall deem' it in the national interest to do so" (App. 47a). That judgment, Judge Buckley concluded, was one that the courts are ill-equipped to second guess.

Finally, Judge Buckley also took issue (App. 52a-54a) with the suggestion that the Director's judgment would be subject to scrutiny for arguable constitutional violations, because judicial review even in those circumstances might undercut the Director's ability to carry out his sensitive duties according to his fuller knowledge of the " 'harsh realities of the present day' " (*id.* at 53a, quoting *CIA* v. *Sims*, 471 U.S. 159, 174 (1985)). The only role for a court, he said, was to determine whether the Director acted within the bounds of his statutory authority, and the Director's statement that he " 'determined that the termination of Mr. Doe's employment was necessary and advisable in the interests of the United States' " satisfied that requirement (App. 54a-55a).

c. The court of appeals rejected the Director's suggestion for rehearing en banc by a 5-5 vote. Judges Bork, Starr, Silberman, Buckley, and Williams would have reheard the case en banc (App. 83a).

REASONS FOR GRANTING THE PETITION

This case presents a question of exceptional public importance regarding the ability of the Director of Central Intelligence to maintain the confidentiality of the Agency's personnel policies and actions. Crucial to the effective operation of any intelligence agency is the ability to protect the secrecy and integrity of the intelligence process, including the reasons for the dismissal of officers or employees in positions of unique trust and confidence whose continued employment its director believes to be detrimental

to the security interests he is responsible for safeguarding. As this Court acknowledged in *CIA* v. *Sims*, 471 U.S. 159, 170 (1985), without such protection a service like the CIA "would be virtually impotent." For that reason, Congress gave the Director "broad power to protect the secrecy and integrity of the intelligence process" (*ibid.*) by granting him the authority under Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. 403(d)(3), to "protect[] intelligence sources and methods from unauthorized disclosure."

The question here involves a subject inseparably linked to the one at issue in *Sims*. The ability to decide what officers and employees of the CIA may have access to confidential information is an essential facet of the ability to protect intelligence sources and methods from unauthorized disclosure. To ensure that the Director could make such personnel decisions without divulging the Agency's decisionmaking processes or policies and other types of confidential or sensitive information in adversary proceedings, Congress enacted Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c). That provision vested in the Director the authority to dismiss summarily an officer or employee of the CIA and excepted removal decisions from judicial review under the APA. Section 102(c) of the National Security Act of 1947, like Section 102(d)(3), was therefore intended to enable the Director to preserve the confidentiality and integrity of the CIA's intelligence functions.

The court of appeals' ruling that the Director's decisions may nonetheless be reviewed under the APA will subvert Congress's statutory scheme. By opening up to judicial (and therefore public) scrutiny[8]

[8] It is unclear from the decision of the court of appeals how frequently the Director's decisions are likely to be subject to

the reasons why an officer or employee must be discharged, the court of appeals' ruling will seriously undermine the Director's ability to safeguard intelligence sources, methods, and personnel from unauthorized revelation. In causing the disclosure of internal decisionmaking processes and policies that the Director has been entrusted by Congress to keep confidential, the decision below will also seriously hamper the CIA's ability to perform its statutory responsibility to "shepherd and analyze a 'mass of information' in order to safeguard national security in the postwar world." *Sims*, 471 U.S. at 170. Review by this Court is therefore clearly warranted.

1. The question whether Section 102(c) precludes judicial review under the APA is entirely a matter of statutory construction.[9] That question must be resolved by looking to "its express language, * * * the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action invoked." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984); see also *Bowen* v. *Michigan Academy of Family Physicians*, No. 85-225 (June 9, 1986), slip op. 5; *Lindahl* v. *OPM*, 470

judicial re-evaluation. By its own terms, though, the decision allows such review at least when the plaintiff brings forth some "concrete evidence" that his termination raises an "*arguable* infringement of constitutional rights" or "the possibility that the Director has acted in excess of statutory authority," that is, other than as "necessary or advisable in the interests of the United States" (App. 24a, 26a (emphasis in original)).

[9] In his amended complaint, respondent also sought relief under 28 U.S.C. 1361 and alleged jurisdiction under 28 U.S.C. 1331 (C.A. App. 46). Although we believe that neither statute provides a basis for judicial review of the Director's decision to dismiss a CIA employee, neither the district court nor the court of appeals addressed these provisions.

U.S. 768, 779 (1985); *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977). Here, those factors strongly militate in favor of the conclusion that the Director has the unreviewable authority to discharge an officer or employee of the CIA.

a. The text of Section 102(c) itself shows that the Director's decisions are unreviewable. In sweeping terms, that provision expressly invests the Director with "discretion" to dismiss "any" officer or employee "whenever he shall deem such termination necessary or advisable in the interests of the United States." The scope of that provision shows that the Director's authority to remove an officer or employee of the CIA is plenary. See *Ludecke* v. *Watkins*, 335 U.S. 160, 165 (1948); *Brown* v. *Lane*, 232 U.S. 598, 601 (1914); *Service* v. *Dulles*, 235 F.2d 215, 218 (D.C. Cir. 1956), rev'd on other grounds, 354 U.S. 363 (1957).[10] That authority is stated as an explicit ex-

[10] In *Ludecke* v. *Watkins*, the President promulgated a regulation pursuant to his authority under the Alien Enemies Act of 1798, ch. 58, 1 Stat. 570 *et seq.*, directing the removal from the United States of all alien enemies "'who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States.'" 335 U.S. at 163 (citation omitted). The Court explained that "removal was contingent not upon a finding that in fact an alien was 'dangerous,'" because "[t]he President was careful to call for the removal of aliens 'deemed by the Attorney General to be dangerous.'" *Id.* at 165. In *Brown* v. *Lane*, a statute authorized the Secretary of the Interior to remove from an Indian tribal council "'any member or members thereof for good cause, to be by him determined.'" 232 U.S. at 599 (citation omitted). This Court concluded that the statute "plainly vested the Secretary of the Interior with the power and discretion to remove" a person from the council without the need to offer notice or a hearing. *Id.* at 601. *Service* v. *Dulles* involved a statute virtually identical to Section 102(c). The court of appeals held that it granted the Secretary of State complete discretion to remove a State Department em-

ception to "the provisions of" the Lloyd-LaFollette Act, 5 U.S.C. (1940 ed.) 652 (subsequently replaced by the Civil Service Reform Act of 1978, 5 U.S.C. 7501 *et seq.*), the then-existing version of the federal civil service laws, "or the provisions of any other law."

At the time that Section 102(c) was adopted, it was firmly settled that a discharged federal employee could not obtain judicial review of his removal unless a statute expressly provided for review.[11] The Lloyd-LaFollette Act was the primary statute protecting federal employees,[12] and it offered certain protections, including removal only "for such cause as will promote the efficiency of [the] service" (5 U.S.C. (1940 ed.) 652), and the rights to a written statement of reasons for removal, notice and a copy of any charges, and an opportunity to examine witnesses at a hearing within the discretion of the removal officer. Section 102(c) made clear that the

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ployee once the Secretary concluded that removal was in the interests of the United States. 235 F.2d at 218. See page 25 & note 22, *infra*.

[11] *E.g.*, *Keim* v. *United States*, 177 U.S. 290, 293-294 (1900) (review unavailable in an action for damages); *White* v. *Berry*, 171 U.S. 366, 377-378 (1898) (review unavailable in an action for reinstatement); see *United States* v. *Testan*, 424 U.S. 392, 406 (1976); *Sampson* v. *Murray*, 415 U.S. 61, 69-71 (1974); see generally *In re Hennen*, 38 U.S. (13 Pet.) 230, 259-260 (1839).

[12] The Veterans' Preference Act of 1944, 5 U.S.C. (1946 ed.) 863, protected veterans in federal employment by extending the Lloyd-LaFollette Act's substantive and procedural protections in several different ways. See *Bush* v. *Lucas*, 462 U.S. 367, 385 n.25 (1983). The Director's authority would not have been limited by that statute, however, because Section 102(c) of the National Security Act of 1947 excepted "the provisions of any other law" in addition to the Lloyd-LaFollette Act.

Director's authority to dismiss a CIA employee was not limited by the Lloyd-LaFollette Act, and thus denied Agency employees the limited rights available to other federal employees in the administrative process. Congress therefore could not have intended to allow CIA employees to obtain those rights through judicial review of the Director's decisions. When read as a whole (see *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975)), Section 102(c) emphatically shows that Congress intended to "preclud[e] judicial review" of the Director's decision to dismiss an officer or employee of the CIA.

b. While the legislative history of the National Security Act of 1947, does not specifically address the meaning of Section 102(c),[13] the structure of the statutory scheme, its objectives, and the nature of the agency action involved (*Block* v. *Community Nutrition Institute*, 467 U.S. at 349) offer a "'persuasive reason to believe'" (*Morris* v. *Gressette*, 432 U.S. at 501, quoting *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967)) that Congress intended to preclude judicial review of the Director's decisions.

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[13] In 1983, however, as part of an intelligence appropriations act Congress authorized the Director to set minimum and maximum age limits for an original appointment to an operational position within the Agency. 50 U.S.C. (Supp. III) 403f(f). In so doing, Congress stated that the language in that amendment "is similar to the language conferring special termination authority upon the Director under subsection 102(c) of the National Security Act of 1947 (50 U.S.C. 403(c)). The courts have uniformly held that such language confers upon the Director authority to be exercised in his exclusive discretion, and that the exercise of such authority is not subject to review, judicially or otherwise." S. Rep. 98-77, 98th Cong., 1st Sess. 6-7 (1983).

The National Security Act of 1947 was adopted shortly after World War II to remedy shortcomings in American intelligence before Pearl Harbor and during the war. See, *e.g.*, S. Rep. 239, 80th Cong., 1st Sess. 2 (1947); H.R. Rep. 961, 80th Cong., 1st Sess. 3-4 (1947); *CIA* v. *Sims*, 471 U.S. 159, 170 (1985). In creating the CIA, Congress was acutely aware of the importance of secrecy to the ability to undertake intelligence activities.[14] To ensure that the Agency could maintain the secrecy of the intelligence it acquired, Congress vested in the Director the responsibility "for protecting intelligence sources and methods from unauthorized disclosure" (50 U.S.C.

[14] The Committees of both Houses went into executive session to consider the proposed legislation. *Sims*, 471 U.S. at 171 n.15, 172. (The executive session of the House Hearings were declassified only in 1982.) The witnesses who testified before Congress also brought home the importance of confidentiality.

High-ranking intelligence officials advised Congress of the perils facing intelligence sources whose identities were revealed. *National Security Act of 1947: Hearing on H.R. 2319 Before the Comm. on Expenditures in the Executive Departments*, 80th Cong., 1st Sess. 10-11 (1947) (statement of General Vandenberg) [hereinafter cited as *Secret House Hearings*]; *id.* at 20 (statement of Allen W. Dulles); *id.* at 59 (statement of Rear Adm. Inglis). In addition, Congress was informed of the risks both from using nongovernment personnel to gather intelligence and from the infiltration of our intelligence networks by foreign agents, or by their supporters. *Id.* at 10-11 (statement of General Vandenberg); *id.* at 50 (statement of Col. Grombach). Significantly, one expert recommended that a member of the armed forces be appointed as Director of the Agency during its early years of operation, because that would overcome the initial reluctance of the military to share intelligence with civilians, who could not be court-martialed for improperly divulging information. *Id.* at 8-9 (colloquy between Reps. Dorn and Hoffman and General Vandenberg).

403(d)(3)), which gave the Director "broad power to protect the secrecy and integrity of the intelligence process" (*Sims*, 471 U.S. at 170). Shortly thereafter, in the Central Intelligence Agency Act of 1949, ch. 227, § 7, 63 Stat. 211, Congress exempted the CIA from any federal law requiring the publication of "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency" (50 U.S.C. 403g), in order to protect what Congress knew to be "the confidential nature of the Agency's functions" (H.R. Rep. 160, 81st Cong., 1st Sess. 7 (1949); see S. Rep. 106, 81st Cong., 1st Sess. 7 (1949)).

Without protection for the secrecy and integrity of the intelligence process, as this Court recognized in *CIA* v. *Sims*, 471 U.S. at 170, the CIA "would be virtually impotent." Its officers and employees have access to classified information, the identities of other personnel in the CIA or in the intelligence services of friendly nations and American citizens or foreign nationals willing to share information with the Agency, the methods used to gather intelligence, and specific intelligence operations. The unauthorized disclosure of this information, innocently or otherwise, can not only cause severe, irreparable injury to the CIA's ability to perform its statutory duties and to other countries whose interests are allied with ours, but also can imperil the persons who perform the Agency's functions. See *Sims*, 471 U.S. at 171-172; *Haig* v. *Agee*, 453 U.S. 280, 283-286 & nn.1-7, 308 & n.59 (1981); *Snepp* v. *United States*, 444 U.S. 507, 512-513 & nn.7-8 (1980). To prevent those harms and to allow the CIA to function effectively, Congress gave the Director authority in 50 U.S.C. 403(d)(3) and 403g, to maintain the confidentiality of the Agency's intelligence-gathering operations.

Section 102(c) must be read against that background. At bottom, it permits the Director to make personnel decisions that enable the CIA to protect intelligence sources and methods.[15] Congress's intent was to grant the Director plenary authority to make personnel decisions in a manner consistent with the Agency's mission "to shepherd and analyze a 'mass of information' * * * to safeguard national security in the postwar world" (*Sims*, 471 U.S. at 170). For "reasons * * * too obvious to call for enlarged discussion" (*ibid.*), the ability to determine who shall have access to classified intelligence by virtue of employment with the CIA is an essential component of the responsibility to protect intelligence sources and methods. Other statutes grant the Secretary of Defense similar authority summarily to discharge an officer or employee of the National Security Agency, 50 U.S.C. 833(a),[16] and the Defense Intelligence Agency, 10 U.S.C. (Supp. III) 1604(e)(1).[17] Congress granted the Secretary that au-

[15] See *Snepp*, 444 U.S. at 512 ("The continued availability of * * * [intelligence] sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the[ir] personal safety.").

[16] 50 U.S.C. 833(a) provides as follows:

> Notwithstanding sections 7512 and 7532 of title 5, or any other provision of law, the Secretary [of Defense] may terminate the employment of any officer or employee of the [National Security] Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

[17] 10 U.S.C. (Supp. III) 1604(e)(1) provides as follows:

> Notwithstanding any other provision of law, the Secretary of Defense may, during fiscal years 1985 and 1986, terminate the employment of any civilian officer or employee of the Defense Intelligence Agency whenever he considers that action to be in the interests of the United States and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such officer or employee cannot be invoked in a manner consistent with the national security. The decisions of the Secretary under this paragraph are final and may not be appealed or reviewed outside the Department of Defense. The Secretary of Defense shall promptly notify the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate whenever this termination authority is exercised.

Section 502 of the Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569 (Oct. 27, 1986), extended the Secretary's summary dismissal authority under 10 U.S.C. (Supp. III) 1604(e)(1) to fiscal years 1986 and 1987. H.R. Conf. Rep. 99-952, 99th Cong., 2d Sess. 24 (1986); H.R. Rep. 99-690, 99th Cong., 2d Sess. Pt. 1, at 20-21 (1986); S. Rep. 99-307, 99th Cong., 2d Sess. 7-8 (1986). Section 504 of that Act also granted the Secretary the same summary dismissal authority for fiscal year 1987 over "any civilian intelligence officer or employee of a military department." H.R. Rep. 99-690, Pt. 1, *supra*, at 25.

[18] For 50 U.S.C. 833(a), see S. Rep. 926, 88th Cong., 2d Sess. (1964) (" 'This grant of authority recognizes the principle that the responsibility for control of those persons who are to have access to highly classified information should be accompanied by commensurate authority to terminate their employment when their retention and continued access to extremely sensitive information is not clearly consistent with the national security.' "); H.R. Rep. 108, 88th Cong., 1st Sess. 4 (1963) (same); *ibid.* ("The section enables the Secretary to terminate employment, when necessary, without jeopardizing the integrity and security of Agency activities through compliance with prolonged adversary proceedings."); *id.* at 5 (the Secretary's decision to invoke these procedures

thority to enable him to regulate employees' access to sensitive information.[18] In so doing, Congress re-

lied on the similar authority granted to the Director of Central Intelligence by Section 102(c) of the National Security Act of 1947.[19] Accordingly, Section 102(c) should be construed in a manner consistent with the structure of the "statutory scheme" and objectives of these closely related provisions (*Block* v. *Community Nutrition Institute*, 467 U.S. at 345).

Achievement of these clear statutory objectives is imperiled by the majority decision below that, once an employee offers "a basis for suspicion that [he was] terminated * * * for an impermissible reason" (App.

"shall be final and the basis for the determination will not be subject to review in any administrative or judicial proceeding"); H.R. Rep. 2120, 87th Cong., 2d Sess. 3, 4 (1962) (same statements as in above cited Senate and House Reports).

For 10 U.S.C. (Supp. III) 1604(e)(1), see S. Rep. 98-481, 98th Cong., 2d Sess. 8 (1984) (noting that "the protection of highly classified information is of paramount importance" and that "[t]he ability to meet security requirements and minimize the risk of compromise of dedicated intelligence personnel must be an important feature of the personnel management system").

[19] See S. Rep. 926, *supra*, at 2 ("It is not novel for Congress to legislate the power of summary dismissal. In fact, Congress granted this same power to the Director of the Central Intelligence Agency in the National Security Act of 1947."); H.R. Rep. 108, *supra*, at 4 ("Moreover, statutory precedent exists. Similar authority to that granted in the bill has been vested by the Congress in the Director of Central Intelligence in section 102(c) of the National Security Act of 1947. The activities of the National Security Agency undoubtedly require equivalent protection from disclosure or compromise."); H.R. Rep. 2120, *supra*, at 4 (same); S. Rep. 98-481, *supra*, at 8-9 ("CIA management can exercise broad discretion for termination of employees. * * * Like CIA, NSA * * * has special termination authority peculiar to its needs. The Defense Intelligency Agency should be able to operate its personnel management system on an equal footing with its two sister intelligence agencies.").

26a), a court must "satisfy [itself] that the termination has *some* relationship to the interests of the United States" (*id.* at 17a (emphasis in original)). Such questions cannot be resolved without the disclosure of sensitive information that Congress did not want publicly revealed. Cf. *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146-147 (1981) (quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1875)) ("we have held that 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated' "). It may require discussion of aspects of the employee's performance which are themselves matters of security concern. Finally, disclosure of the CIA's personnel practices themselves may allow our adversaries to defeat intelligence gathering operations by infiltration or other means.

2. The majority below also erred in ruling (App. 16a-19a) that the Director's decision to discharge a CIA officer or employee was not "committed to agency discretion by law" under the APA by Section 102(c) of the National Security Act of 1947. The language of Section 102(c) in this regard could not be clearer. It authorizes the Director "*in his discretion*" to dismiss any officer or employee "whenever *he* shall deem such termination necessary or advisable in the interests of the United States" (emphasis added). The most natural reading of that provision is that the Director has the absolute discretion to decide whether an employee should be retained or dismissed. See *Ludecke* v. *Watkins*, 335 U.S. at 165; *Brown* v. *Lane*, 232 U.S. at 601; *Service* v. *Dulles*, 235 F.2d at 218; compare *Falkowski* v. *EEOC*, 764 F.2d 907, 911 (D.C. Cir. 1985), cert. denied, No. 85-1894 (June 30, 1986)

(Attorney General has unreviewable discretion to decide whether to provide counsel to government employees in private litigation pursuant to his authority to attend to "the interests of the United States" under 28 U.S.C. (Supp. III) 517. Section 102(c) of the National Security Act of 1947 therefore fits squarely within the APA exception for agency action committed to agency discretion by law.

The reasons given in *Sims* why the courts—with "little or no background in the delicate business of intelligence gathering" (471 U.S. at 176)—are ill-equipped to review the Director's judgments whether to reveal intelligence sources and methods are equally applicable here. See *ibid.* ("a court's decision whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments"); cf. *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985). Moreover, fully to understand the Director's decisions would require a court to "be familiar with 'the whole picture'" (*Sims*, 471 U.S. at 179), and disclosure of the necessary information would compromise the very interests that 50 U.S.C. 403(d)(3) and 403g were adopted to protect. Accordingly, as Judge Buckley summarized (App. 47a (emphasis in original)), "the operative requirement [in Section 102(c)] is that the Director *believe* that the termination safeguards the interests of the United States and not (as the majority suggests) that it do so in fact."

3. The court of appeals was troubled by the prospect of adopting a construction of Section 102(c) of the National Security Act of 1947 that would foreclose judicial review under the APA of respondent's constitutional claims (App. 14a n.27, 16a-17a & n.33, 18a & n.35, 24a; *id.* at 33a (Ginsburg, J., concurring)). This Court has often noted that a serious constitutional question would be presented by a

statute that barred a party from asserting a constitutional challenge to governmental action. For that reason, when possible the Court has construed a statute in a manner that does not foreclose a party from raising a constitutional claim. *E.g.*, *Bowen* v. *Michigan Academy of Family Physicians*, slip op. 14 n.12; *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974). At the same time, the Court has also made clear that a statute may not be interpreted in a manner tantamount to judicial amendment simply to avoid confronting a constitutional question. A constitutional issue can be avoided only when it is "fairly possible" to interpret a statute in another manner. *E.g.*, *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 6; *Heckler* v. *Mathews*, 465 U.S. 728, 742-743 (1984); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

Such an interpretation is not possible here. The text of Section 102(c), which was adopted a year after the enactment of the APA, does not distinguish between constitutional and nonconstitutional claims. The purpose of Section 102(c) is also indifferent to the various types of claims that can be presented. Disclosure of the facts and rationale underlying the Director's actions will damage the CIA's intelligence functions regardless of the ground on which the Director's decision is challenged. Section 102(c) therefore cannot fairly be construed as being limited to nonconstitutional challenges to the Director's exercise of his authority.

So read, Section 102(c) is a constitutional exercise of Congress's authority to protect the nation's security. The government has a surpassing interest in protecting from public disclosure the Director's personnel decisions, which necessarily relate to the national security. As the Court explained in *Haig* v. *Agee*, 453 U.S. at 307, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling

than the security of the Nation," and "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests." See also *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964); *Cole* v. *Young*, 351 U.S. 536, 546 (1956). The Court has also acknowledged, with particular reference to the CIA, that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp*, 444 U.S. at 509 n.3; see also *Sims*, 471 U.S. at 175; *Agee*, 453 U.S. at 307; compare *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). Given "the harsh realities of the present day" (*Sims*, 471 U.S. at 174), Congress's authority to protect the CIA's intelligence functions is at its apogee. To achieve that goal, Congress may invoke its broad power to define and regulate the jurisdiction of the lower federal courts.[20]

Section 102(c) is also narrowly limited to employment voluntarily undertaken *with the CIA*. Its last clause states that dismissal from the CIA does not itself bar a former employee from obtaining other federal employment. See 10 U.S.C. (Supp. III) 1604 (e)(2); 50 U.S.C. 833(b) (to the same effect). Cf.

[20] *E.g.*, U.S. Const. Art. III, § 1; *South Carolina* v. *Regan*, 465 U.S. 367, 395-396 (1984) (O'Connor, J., concurring in the judgment); *Lockerty* v. *Phillips*, 319 U.S. 182, 187-189 (1943); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448-449 (1850); see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868); cf. *Ludecke* v. *Watkins*, *supra* (upholding the President's unreviewable power under the Alien Enemies Act of 1798, ch. 58, 1 Stat. 570 *et seq.*, to detain and deport potentially dangerous aliens during time of war). Significantly, the Constitution itself provides for suspension of the writ of habeas corpus when "in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, Cl. 2.

Snepp, 444 U.S. at 509 n.3 (requiring Agency employees to submit to prepublication review was "an 'entirely appropriate' exercise of the CIA Director's statutory mandate" to protect intelligence sources and methods). Given these considerations, Section 102(c) may validly be applied to foreclose judicial review of even constitutional claims under the APA.[21]

4. As Judge Buckley explained (App. 41a-43a, 54a-55a), the majority opinion below cannot be reconciled with several earlier decisions of the District of Columbia Circuit. In *Service* v. *Dulles*, involving a virtually identical grant of authority to the Secretary of State,[22] the court ruled that the judicial

[21] Although we have not presented it as a separate question, we disagree with the majority below that respondent could state an *"arguable"* constitutional claim if he were dismissed pursuant to a CIA personnel policy barring the employment of all homosexuals (App. 27a (emphasis in original)). The majority below conceded that this Court's decision in *Bowers* v. *Hardwick*, *supra*, and the District of Columbia Circuit's own earlier decision in *Dronenburg* v. *Zech*, *supra*, make clear that "homosexual *conduct* is not constitutionally protected" (App. 27a (emphasis in original)). Respondent stated in his amended complaint, however, that he "has engaged in homosexual activities since 1976" (C.A. App. 47). Judge Buckley was therefore correct in concluding (App. 52a-54a) that the majority's effort to find an arguable constitutional violation was strained.

[22] The Department of State Appropriations Act of 1952, ch. 533, § 103, 65 Stat. 581 (expired at the close of fiscal year 1952). That statute provided, in pertinent part, that "[n]otwithstanding the provisions of [the Lloyd-LaFollette Act], or the provisions of any other law, the Secretary of State may, in his absolute discretion, * * * terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States." See App. 41a-42a; *Service* v. *Dulles*, 235 F.2d at 216 n.1.

" 'function is limited to determining whether any procedural requirement of the statute was violated in [an employee's] discharge' " (235 F.2d at 218). Once a court concluded, however, that the Secretary had met the " 'one procedural requirement' " imposed by the statute—*i.e.*, that the Secretary determine that it was "in the interests of the United States" to dismiss an employee—judicial review came to an end (*ibid.*).[23] The majority opinion in this case made no attempt to square its holding with the decision in *Service*. See also *Scher* v. *Weeks*, 231 F.2d 494 (D.C. Cir.), cert. denied, 351 U.S. 973 (1956) (concluding that Section 304 of the Act of July 10, 1952, ch. 65, 66 Stat. 567, which authorized the Secretary of Commerce to dismiss an employee "whenever he shall deem such termination necessary or advisable in the best interests of the United States," was satisfied and was constitutional). Similarly, in *Torpats* v. *McCone*, 300 F.2d 914 (D.C. Cir.), cert. denied, 371 U.S. 886 (1962), which also involved Section 102(c) of the National Security Act of 1947, plaintiff alleged that the Director's decision exceeded his statutory authority. The court did not require the Director to explain why he deemed it "in the interests of the United States" to discharge the employee and simply concluded that the Director had acted within his statutory authority (300 F.2d at 915).[24]

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[23] This Court subsequently reviewed the Secretary's decision to determine whether he had followed the State Department's discretionary regulations. 354 U.S. at 372-382. In this case, the court of appeals specifically held that the Director did not fail to comply with the Agency's own regulations. App. 19a-23a.

[24] The majority in the court below sought to distinguish *Torpats* on the ground that the court there did not refuse to review the Director's decision to dismiss a CIA employee and instead ruled that the Director had acted within his statutory authority (App. 14a n.26, 18a-19a). In light of the District of Columbia Circuit's earlier decisions in *Service* v. *Dulles* and *Scher* v. *Weeks*, however, the best reading of the decision in *Torpats* v. *McCone*, *supra*, is that the court concluded that the Director had the plenary authority under Section 102(c) to discharge CIA employees.

The opinion of the court below is also inconsistent with decisions of the Court of Claims, which have been adopted as precedent by the Federal Circuit.[25] See *Baker* v. *United States*, 224 Ct. Cl. 760 (1980), cert. denied, 450 U.S. 1040 (1981). In *Baker*, several CIA employees were discharged as part of a reduction in force under a regulation implementing Section 102(c). They brought suit alleging, inter alia, dismissal for reasons other than "the interests of the United States" and contrary to the Veterans' Preference Act of 1944, 5 U.S.C. 3502. The Court of Claims held that they had failed to state a claim because Section 102(c) " 'gave the Director of the Central Intelligence Agency the absolute right to terminate any employee whenever he deemed it necessary or advisable.' " 224 Ct. Cl. at 762 (quoting *Rhodes* v. *United States*, 156 Ct. Cl. 31, 36, cert. denied, 371 U.S. 821 (1962) (holding that a former CIA employee could not challenge his dismissal on the ground that it violated the Veterans' Preference Act of 1944)).[26]

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[25] *South Corp.* v. *United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982 (en banc).

[26] To be sure, the plaintiffs in *Baker* did not allege that their dismissal was unconstitutional, and the Court of Claims did not therefore address that claim. Nonetheless, unlike the court below, the Court of Claims recognized that the Director has plenary authority under Section 102(c) to dismiss an employee, and did not require the Director to explain why the plaintiffs' discharge was "in the interests of the United

This conflict between the court below and Federal Circuit precedent has important practical consequences. Former CIA employees seeking monetary relief, such as back pay, must litigate their claims in the Federal Circuit.[27] By contrast, CIA employees, like respondent,[28] seeking non-monetary relief, such as reinstatement, may litigate their claims in the District of Columbia Circuit. Accordingly, review by this Court is necessary to resolve this conflict of particular significance.

5. As Congress has indicated by relying on the "precedent" of Section 102(c) of the National Security Act of 1947 to adopt similar statutes for the National Security Agency and the Defense Intelligence Agency, the Director of Central Intelligence must have the authority to act swiftly to dismiss from the CIA officers or employees whom the Director determines should no longer be privy to the confidential information that the Director is sworn to protect. The Director cannot be required to disregard the reality that some employees may be susceptible to blackmail or to other forms of influence or control by unfriendly foreign governments, or that the disclosure of the reasons underlying his decisions

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States," even though the plaintiffs alleged that the Director had exceeded his statutory authority.

[27] A claim for back pay in excess of $10,000 must be brought in the Claims Court (28 U.S.C. 1346(a)(2), 1491), and an appeal of the judgment is to the Federal Circuit (28 U.S.C. 1295(a)(1)). A back pay claim seeking $10,000 or less may be brought in the Claims Court or in district court, but any appeal is to the Federal Circuit (28 U.S.C. 1295(a)(1); 28 U.S.C. 1295(a)(2)).

[28] Respondent sought back pay in his original complaint, but he omitted a claim for back pay in his amended complaint (see App. 60a n.2). Respondent has therefore waived any back pay claim in this case.

can have serious and irreparable repercussions for our intelligence services.

Moreover, review by this Court is needed at the present time because the court of appeals' decision "would force the Director now or in the future to risk the public airing of agency policies and concerns as well as the particular information upon which a specific termination decision is based" (App. 50a (Buckley, J., dissenting)). Indeed, the ill effects of the court of appeals' ruling will be felt both immediately and recurrently. The immediate effect will be an inappropriate and seriously intrusive inquiry into the CIA's employment policies and practices. The decision whether to disclose that information, however, is precisely the type of matter that Congress has left to the Director. Indeed, in a particular case the Director may need to create the impression that his decision rested solely on one factor (such as inefficiency) to avoid publicizing the far more sensitive basis for an employee's dismissal (such as a breach of security). The court of appeals' decision also creates the risk that the Director will be forced to reveal confidential information in future cases once "a plaintiff offers a basis for suspicion that the Director terminated [his] employment for an impermissible reason" (App. 26a). By holding that the Director's decisions may be reviewed under the APA, the court of appeals has created the risk that our intelligence process will be seriously damaged in this or in future cases.

Review by this Court at this time is clearly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40194

APPENDIX

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No.

Supreme Court, U.S.
FILED
FEB 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE,
PETITIONER

v.

JOHN DOE

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5291

JOHN DOE

v.

WILLIAM J. CASEY, DIRECTOR, C.I.A., APPELLANT

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 82-02016)

Argued March 13, 1986

Decided August 1, 1986

Before: EDWARDS, GINSBURG and BUCKLEY, *Circuit Judges.*

Opinion for the Court filed by EDWARDS, *Circuit Judge.*

Concurring opinion filed by GINSBURG, *Circuit Judge.*

Opinion concurring in part and dissenting in part filed by BUCKLEY, *Circuit Judge.*

EDWARDS, *Circuit Judge*: The Central Intelligence Agency ("CIA") appeals from a District Court order requiring the CIA to reinstate a former undercover employee to administrative leave status. The undercover employee—appellee John Doe—was terminated from CIA employment after he informed the CIA of his homosexuality. Doe's employment was terminated by the Director of Central Intelligence ("Director"), acting under section 102(c) of the National Security Act of 1947, which provides that the Director may, in his discretion, terminate the employment of any CIA employee "whenever he shall deem such termination necessary or advisable in the interests of the United States." [1]

Doe commenced this action in District Court, seeking reinstatement to his old position, or, in the alternative, reinstatement to administrative leave status and a reconsideration of the CIA's decision to terminate his employment. He alleges that he was terminated without adequate procedural protections in violation of CIA regulations, the Administrative Procedure Act ("APA"), and the due process clause of the Fifth Amendment. The District Court ordered Doe reinstated to administrative leave status and directed the CIA to reconsider Doe's termination using procedures that would provide Doe with a meaningful statement of the CIA's reasons and an opportunity to respond.

On appeal, the Government argues principally that the CIA's decision to terminate Doe's employment under section 102(c) is not subject to judicial review. Although section 102(c) gives the Director of Central Intelligence broad discretion, we conclude

[1] 50 U.S.C. § 403(c) (1982).

that judicial review is neither precluded by statute nor foreclosed by the absence of judicially manageable standards. We reverse the judgment of the District Court, however, because the court failed to accord sufficient deference to the judgment of the head of the agency. Given the sensitive nature of decisions by the Director of Central Intelligence concerning removal of employees under section 102(c), we hold that an employee must present some concrete evidence of an impermissible basis for his or her termination before a court may require the CIA to explain the reason for that termination. No such evidence was presented by Doe in this case. Nonetheless, because the record is unclear on certain critical points, we remand for further proceedings.

I. BACKGROUND

The plaintiff, John Doe,[2] had a nine-year career with the CIA. Although he began that career as a clerk-typist, he was eventually promoted, after agency training, to a covert position as an electronics technician. Periodic fitness reports consistently rated Doe as either an excellent or an outstanding employee, and the CIA expressed no dissatisfaction with either Doe's work or his loyalty.

On January 28, 1982, Doe voluntarily informed a CIA security officer that he was a homosexual. As a result, the CIA placed Doe on administrative leave on February 2, 1982, pending an investigation for his homosexuality. Under this status, Doe did not report for work, but the CIA continued to pay his

[2] John Doe is proceeding under a pseudonym only because his status as a CIA employee cannot be publicly acknowledged, not because of any embarrassment about his homosexuality.

salary. On February 12 and 17, Doe was interviewed at length by a polygraph officer about his sexual orientation and possible security violations. After these interviews, which lasted a total of ten hours, the officer told Doe that the polygraph indicated that he had truthfully answered all questions. His answers included statements that he had not had sexual relations with any foreign nationals and had not disclosed classified information to any sexual partners.

The polygraph officer prepared a five-page factual report based on the two days of interviews. Doe reviewed this factual report on March 23, 1982, and, in addition, Doe prepared a two-page addendum. On April 14, 1982, a CIA security officer informed Doe that the CIA's Office of Security had determined that the circumstances of his homosexuality posed a security threat, but refused to explain why Doe's homosexuality posed such a danger. Throughout the previous two months of investigation, Doe had received conflicting explanations about the CIA's policy toward homosexuals. While two CIA security officers told Doe that his homosexual activities violated CIA regulations, the Deputy General Counsel of the CIA told Doe's counsel that homosexuality was a security concern that did not inevitably result in termination. Instead, according to the Deputy General Counsel, the CIA considers homosexuality on a case-by-case basis.

Doe was asked to resign on April 14, but refused to do so. The Office of Security then recommended to the Director of Central Intelligence that the CIA terminate Doe's employment. On April 20, Doe's counsel delivered a detailed letter to the Director concerning Doe's case, but the CIA made no response.

On May 12, 1982, a security officer informed Doe that the Director had terminated his employment effective May 7, 1982. Doe's counsel later received a letter from the Deputy General Counsel of the CIA dated May 11, 1982, confirming Doe's termination:

> The Director has reviewed the facts of your client's case, your client's memorandum commenting upon those facts, the Office of Security's evaluation of the security significance of those facts, and the statement submitted by you in your client's behalf.
>
> After careful consideration of this matter, the Director has deemed it necessary and advisable in the interests of the United States to terminate your client's employment with this Agency pursuant to section 102(c) of the National Security act [sic] of 1947, as amended.[3]

Doe was never told why he was considered a security risk and never had access to the Office of Security evaluations. The Director's decision to terminate Doe's employment was made pursuant to section 102 (c) of the National Security Act, which provides:

> Notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the Director of the Office of Personnel Management.[4]

---

[3] Joint Appendix ("J.A.") 31.

CIA officials told Doe that the agency would give a positive recommendation on his behalf to any prospective employer; Doe also was advised that if he applied for a job that required a security clearance, the CIA would inform the prospective employer that it had determined that Doe presented a security threat "because of his homosexuality." Moreover, a member of the General Counsel's staff told Doe that he is obliged to inform the CIA whenever he applies for a job that requires a security clearance.

Doe then commenced this action in District Court. His complaint alleged that the CIA's decision to fire him because of his homosexuality violated both procedural and substantive protections to which he was entitled by law. To remedy the substantive violations, Doe sought outright reinstatement to his old position with the CIA. For violation of procedural protections, on the other hand, Doe sought a new determination by the Director under fair procedures.[5] Doe filed a motion for partial summary judgment on the procedural claims, which were alleged violations of CIA regulation, the APA and the due process clause of the Fifth Amendment. The District Court granted Doe summary judgment on the violations alleged respect to the CIA regulations and the APA, but declined to reach the constitutional issues. The trial court ordered Doe reinstated to administrative leave status and directed the CIA to reconsider his case using procedures that would provide Doe with a meaningful statement of the CIA's reasons for the termination and with an opportunity to respond.

This appeal followed.

---

[4] 50 U.S.C. § 403(c) (1982).

[5] Doe principally seeks an explanation of precisely why his employment was terminated.

II. Analysis

A. *Preclusion of Review*

On appeal, the CIA has contended that its decision to terminate Doe's employment is not reviewable under the APA. We conclude that section 102(c) obviously requires that we give deference to the judgment of the Director of Central Intelligence; however, we cannot countenance the CIA's unprecedented attempt to preclude judicial review when it is absolutely clear that the Director's discretion is expressly limited by the terms of the statute that has been cited by the CIA to support the Director's exercise of authority.

Under section 10(a) of the APA,[6] agency actions are judicially reviewable

> except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

In the decades of litigation over the scope of these two grounds for preclusion, the Supreme Court and this court have emphasized in the strongest terms that preclusion is the rare exception and certainly not the norm. Section 10 "creates a strong presumption of reviewability that can be rebutted only by a clear showing that judicial review would be inappropriate."[7] As the Supreme Court most recently explained:

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[6] 5 U.S.C. § 701(a) (1982).

[7] *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979); *see also Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967); *WWHT, Inc. v. FCC*, 656 F.2d 807, 815 (D.C. Cir. 1981).

> We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive violates such a command.[8]

The presumption of reviewability is firmly rooted even in pre-APA administrative law,[9] and is clearly reflected in the legislative history of the APA.[10] The compelling reasons for this presumption are well known, and recently have been reiterated in an article by Professor Sunstein:

> The presumption of reviewability under the APA is based on a set of considerations, loosely captured in the notion of the rule of law, that relate to the perceived need to constrain the exercise of discretionary power by administrative agencies. Judicial review serves important goals in promoting fidelity to statutory requirements and, where those requirements are ambiguous or vague, in increasing the likelihood that the regulatory process will be a reasonable exercise of discretion instead of a bow in the direction of powerful private groups.[11]

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[8] *Bowen v. Michigan Academy of Family Physicians*, 54 U.S.L.W. 4594, 4598 (U.S. June 9, 1986).

[9] 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.4 (2d ed. 1984).

[10] *See* H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946) ("To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.").

[11] Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 655 (1985).

In light of the prevailing case law, there is little doubt that, in seeking to overcome the strong presumption of judicial review, the CIA shoulders a very heavy burden. We will address in turn each of the two possible grounds for the preclusion of review.

1. *Preclusion by Statute*

The first question we consider is whether Congress expressed an intention to preclude review of the Director's decision to terminate the employment of a CIA employee under section 102(c). Fortunately, the Supreme Court has elaborated several principles to guide our inquiry.

First, there must be a showing of "clear and convincing evidence" of a congressional intent to negate review before courts may legitimately restrict access to judicial review.[12] Although the "clear and convincing evidence" standard is not a rigid evidentiary test,[13] a court should not refuse to review agency action if there is substantial doubt that Congress intended to preclude review.[14] Rather, at the very least, such an intent to preclude review must be "fairly discernible" in the detail of the legislative scheme.[15]

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[12] *See Lindahl v. Office of Personnel Management*, 105 S. Ct. 1620, 1627 (1985); *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); *WWHT, Inc. v. FCC*, 656 F.2d 807, 809 (D.C. Cir. 1981). As discussed previously, this "clear and convincing evidence" standard is based on clear congressional intent. *See* H.R. REP. No. 1980, *supra* note 10, at 41.

[13] *Block v. Community Nutrition Institution*, 467 U.S. 340, 351 (1984).

[14] *Id.*

[15] *Id.* (quoting *Data Processing Service v. Camp*, 397 U.S. 150, 157 (1970)).

Second, the Supreme Court has never found a congressional intent to preclude review when the statute at issue specifies a standard that at least purports to limit agency discretion. In *Southern Railway Co. v. Seaboard Allied Milling Corp.*,[16] for example, the Court held that the Interstate Commerce Commission's decision not to suspend and investigate a proposed rate increase was not subject to judicial review primarily because the statute was silent on what factors should guide the Commission's decision. When, however, as in *Citizens to Preserve Overton Park, Inc. v. Volpe*,[17] the statute on its face provides a standard limiting agency discretion, the Court "easily" rejects the argument that review is precluded by statute.

Simply stated, when agency authority is defined or limited pursuant to a substantive standard, this is highly probative evidence that Congress did not intend to preclude judicial review. Indeed, if the chosen standard is judicially manageable, it is difficult to imagine stronger evidence of an intent *not* to preclude judicial review. It may be, of course, that the standard chosen by Congress is such that it offers no meaningful basis upon which to judge the agency's exercise of discretion. In such a circumstance, however, the wiser policy is to treat the agency action as "committed to agency discretion" and hence precluded from review by section 10(a)(2). Thus, when Congress has chosen a standard, the preclusion analysis for section 10(a)(2) rather than section 10(a)(1) is appropriate.[18]

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[16] 442 U.S. 444 (1979).

[17] 401 U.S. 402, 410 (1971).

[18] As Justice Rehnquist noted in *Heckler v. Chaney*, 105 S. Ct. 1649, 1655 (1985), section 10(a)(2)'s preclusion of review when a decision is "committed to agency discretion" would be unnecessary unless there are circumstances in which "Congress has not affirmatively precluded review," but has chosen a standard such that "a court would have no meaningful standard against which to judge the agency's exercise of discretion."

Third, the structure of a statutory scheme sometimes may support a finding that Congress intended to preclude judicial review; however, the Supreme Court has accepted arguments based on structure only in a very limited category of cases involving uniquely complex or otherwise delicately balanced statutory schemes. The best example of this is seen in *Block v. Community Nutrition Institute*,[19] where the Supreme Court relied heavily on the omission of an express provision for participation by consumers in the development of milk-market orders as evidence of an intent to preclude consumers from seeking judicial review only because the statute included specific and detailed provisions for the participation of milk handlers and producers.[20] Moreover, the Court took care to emphasize the complexity of the statutory scheme.[21] Similarly, in *Morris v. Gressette*,[22] the Court held that the Attorney General's failure to object to a change in voting procedure was pre-

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[19] 467 U.S. 340 (1984).

[20] *Id.* at 346-47.

[21] *See, e.g., id.* at 347, 348 & 352. A similar logic was used to find preclusion in *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979). Congress provided mandatory language in the statute when it wished to provide judicial review. Therefore, its use of permissive language without any standard was strong evidence of an intent to preclude review.

[22] 432 U.S. 491 (1977).

cluded from review by the Voting Rights Act of 1965. Central to the Court's decision, however, was the delicate balance between Congress' decision to authorize the Attorney General to impose the "extraordinary remedy" of postponing the effect of state legislation and Congress' desire to prevent undue delay.[23] In other cases involving less complicated or delicate statutory frameworks, nearly identical arguments based on the "statutory framework" have been unavailing.[24]

Under our reading of the extant case law, it is abundantly clear that the CIA has failed to carry its burden to establish clear and convincing evidence of a congressional intent to preclude judicial review in section 102(c). The language of the statute itself cannot be fairly read to preclude judicial review, and legislative history is silent on the issue. Most importantly, section 102(c) provides a standard—the termination must be "necessary or advisable in the interests of the United States." As discussed above, Congress' decision to cabin the Director's discretion by the use of this standard is compelling evidence of its intent *not* to preclude judicial review. Congress could have left section 102(c) terminations unambiguously to the Director's absolute discretion; this, however, Congress chose not to do. Finally, arguments based on the statutory "framework" simply have no force where, as here, there is a single statutory provision unaccompanied by any "scheme" or "framework."

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[23] *Id.* at 504.

[24] *See, e.g., Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Local 1219, AFGE v. Donovan*, 683 F.2d 511, 516-18 & n.16 (D.C. Cir. 1982) (permissive statutory language alone does not suggest a congressional intent to preclude review).

The specific arguments made by the CIA are easily rejected. The CIA contends that the statutory language—"notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law"—removes the basis for any and all judicial review. This argument is, at best, strained. Section 102(c) does not prevent the application of *all* law; instead, it merely replaces one set of standards—the more rigorous efficiency standards normally applied to the termination of federal employees [25]—with a new, more relaxed standard: that the termination be "necessary or advisable in the interests of the United States." The obvious result is that the Director of Central Intelligence has far more discretion in personnel matters than other federal agencies. This relaxation in standard, however, in no way manifests a congressional intent to preclude review altogether.

The CIA additionally maintains that the sensitive nature of its work requires that judicial review be precluded. Our inquiry, however, is limited to what *Congress* intended, not what the CIA finds preferable. Congress could have explicitly precluded judicial review; it did not do so. Or, Congress could have written section 102(c) narrowly to state that "the Director may, in his sole discretion, terminate the employment of any officer or employee of the Agency" (omitting any reference to "necessary or ad-

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[25] Section 102(c) specifically references only one portion of the United States Code—5 U.S.C. § 7501 (1982). This is an unambiguous reference to the statutory protections offered most federal employees. *See* 5 U.S.C. §§ 7501-14 (1982) (providing standards and procedure for adverse actions against federal employees). Under these provisions a federal employee may be dismissed "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a) (1982).

visable in the interests of the United States"); it did not so limit the language of the statute.

Moreover, the CIA is unable to offer any contemporaneous legislative history suggesting that Congress intended to preclude judicial review. The CIA merely points to a Senate Report, written decades *after* the enactment of section 102(c), which incorrectly states that courts have interpreted section 102(c) as giving unlimited discretion to the Director.[26] This Report, however, is simply not relevant to congressional intent in 1947.[27]

The CIA has simply failed to overcome the presumption of reviewability. Neither the statute nor legislative history offer even a hint of a congressional intent to preclude review.

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[26] *See* S. REP. No. 77, 98th Cong., 1st Sess. 6-7 (1983), cited in Reply Brief for Appellant at 9. It is manifestly untrue that all courts have interpreted section 102(c) as precluding review. Indeed, this circuit in *Torpats v. McCone*, 300 F.2d 914, 915 (D.C. Cir.), *cert. denied*, 371 U.S. 886 (1962), upheld a termination of a CIA employee as "within the authority conferred [on the Director] by Congress" and did *not* refuse review.

[27] One final CIA argument deserves only a short comment. The CIA argues that the statute's language, "[n]otwithstanding . . . any other law," explicitly prevents the application of the APA. Although we agree that the APA is a "law," we find it plain that it is not the type of law to which the statute refers. The "law[s]" to which section 102(c) refers are those that would otherwise limit the Director's discretion to terminate CIA employees. The APA does not itself limit the Director's discretion. Instead, APA review merely ensures that the Director does not exceed the authority granted by section 102(c) and that the Director does not violate other limits—such as the Constitution—on his or her discretion.

2. *Committed to Agency Discretion*

Our next task is to determine whether the standard offered by section 102(c)—that terminations be "necessary or advisable in the interests of the United States"—commits the decisionmaking to the Director's judgment absolutely. As with the section 10(a)(1) exception, the section 10(a)(2) exception for action committed to agency discretion by law is a "narrow" exception,[28] and we operate under a presumption of reviewability.[29] Indeed, even the Government concedes that this presumption of reviewability applies. It simply asserts that that presumption is sufficiently rebutted in this case.

In order for the "committed to agency discretion" exception to preclude judicial review altogether, the Government must establish that "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[30] There must, in other words,

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[28] *Heckler v. Chaney*, 105 S. Ct. 1649, 1659 (1985); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Adams v. Richardson*, 480 F.2d 1159, 1161 (D.C. Cir. 1973) (en banc).

[29] *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985). While *Heckler v. Chaney*, 105 S. Ct. at 1656, applied a presumption of nonreviewability to agency *enforcement discretion*, even the Government admits that no such presumption is applicable in the instant case. This case concerns agency action that involves coercive power over a federal employee and in an area traditionally subject to judicial scrutiny. *See Heckler v. Chaney*, 105 S. Ct. at 1656 (contrasting an agency's decision not to act with agency action such as that involved in the instant case); *Robbins*, 780 F.2d at 45 (limiting *Heckler's* presumption of nonreviewability to enforcement decisions).

[30] *Heckler v. Chaney*, 105 S. Ct. at 1655; *see State of Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1255 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1186 (1986).

simply be "no law to apply." [31] The fact that a statute gives an agency broad discretion

> does not render the agency's decisions completely nonreviewable under the "committed to agency discretion by law" exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised.[32]

In the instant case, we surely cannot find that section 102(c) offers "absolutely no guidance" as to how the Director of Central Intelligence is to exercise his or her discretion to terminate CIA employees. Obviously, courts must give great deference to the judgment of the Director as to what is "necessary or advisable in the interests of the United States," but the Director's exercise of discretion is still subject to judicial review. Without doubt, for example, the Director could not terminate Black employees simply because they are Black, female employees simply because they are female, or even blonde employees simply because they are blonde.[33]

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[31] *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 410 (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)).

[32] *Robbins*, 780 F.2d at 45; *see also Local 1219, AFGE v. Donovan*, 683 F.2d 511, 515 (D.C. Cir. 1982).

[33] Even in cases in which courts have held actions "committed to agency discretion by law," some review is still available to ensure that the agency has not violated other constitutional or statutory commands. *See Hondros v. United States Civil Service Comm'n*, 720 F.2d 278, 293 (3d Cir. 1983) ("even those actions 'committed to agency discretion by law' are reviewable on grounds that the agency lacked jurisdiction, that the agency's decision was occasioned by 'impermissible influences,' or that the decision violates any constitutional, statutory, or regulatory command"); *WWHT, Inc. v. FCC*, 656 F.2d at 815 n.15 ("In no event would a finding of non-

Indeed, Government counsel conceded at oral argument that the agency was not prepared to say that constitutional claims, or even claims that the Director acted in excess of his or her statutory authority, are precluded from review.

Additionally, section 102(c) requires that an employee be terminated *only* if the termination advances the interests of the United States. Although the court cannot second-guess the Director's decision that the termination of an employee is advisable in the interests of the United States, we must at least satisfy ourselves that the termination has *some* relationship to the interests of the United States. Thus, section 102(c) terminations cannot be a result of the mere whim of the Director. Otherwise, the words of section 102(c) would become nothing more than a magical incantation immunizing wholly irrational, vindictive or even blatantly unconstitutional action. Assuredly, therefore, the Director's discretion is not absolute.

In similar circumstances, other courts have refused to preclude review. In *Barlow v. Collins*,[34] for example, the Supreme Court held that even a statute authorizing the Secretary of Agriculture "to pre-

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reviewability on the ground that an action is committed to agency discretion preclude judicial review when constitutional violations have been alleged."); Sunstein, *supra* note 11, at 658 ("[I]f a plaintiff claims that an agency has taken constitutionally impermissible factors into account, there is always 'law to apply'—no matter what the governing statute may say. Similarly, if the plaintiff alleges that the agency's conduct has been based on factors that are irrelevant under the governing statute, there is always law to apply, even if the agency has especially broad discretion in weighing those factors that are statutorily relevant.").

[34] 397 U.S. 159, 166 (1970).

scribe such regulations as he may deem proper" did not preclude judicial review. In a justly celebrated decision by the late Judge Friendly, the Second Circuit held that the decision of the Immigration and Naturalization Service not to exercise its discretion to suspend an alien's deportation was subject to arbitrary and capricious review *even though the statute in question itself offered no standards for the exercise of that discretion.*[35] Even in a recent case challenging the Government's selective enforcement of a law—an action arguably subject to a presumptive of nonreviewability—the Supreme Court did not refuse to review for First and Fifth Amendment violations.[36] Finally, this court in *Torpats v. McCone*[37] addressed the very statute at issue in this case and—rather than refuse review—upheld the termination

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[35] *Wong Wing Hang v. INS*, 360 F.2d 715 (2d Cir. 1966). Judge Friendly explained the possible grounds for a finding of an abuse of discretion:

> Without essaying comprehensive definition, we think the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other "considerations that Congress would not have intended to make relevant."

Id. at 719 (quoting *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950)). Clearly these same factors would also constitute an abuse of discretion in the context of section 102(c) terminations.

[36] *See Wayte v. United States*, 105 S. Ct. 1524, 1531 (1985) (challenging selective prosecution of draft registration law violators).

[37] 300 F.2d 914 (D.C. Cir.), *cert. denied*, 371 U.S. 886 (1962).

of a CIA employee as "within the authority conferred upon [the Director] by Congress."[38]

We conclude therefore that there is "law to apply." The statute gives broad discretion to the Director, but that discretion is simply not absolute.

B. *The Alleged Breach of the CIA Regulations*

On the merits, Doe first claims that a CIA Headquarters regulation imposes independent limitations on the Director's discretion to terminate employees pursuant to section 102(c). Generally, an agency must follow its own regulations, and judicial review is available for claims that agency regulations have been violated.[39] At issue here is whether the particular CIA regulation cited by appellee indeed limits the CIA's discretion.

We conclude that the CIA regulation does not so limit the Director's discretion. The regulation lists ten circumstances in which employees may be separated from the CIA, the last of which is almost identical to section 102(c):

> OTHER TERMINATION IN THE INTERESTS OF THE AGENCY. In addition to paragraphs a through i, employees may be terminated if the Director of Central Intelligence determines it necessary and advisable in the interest of the Agency or for other reasons contributing to the efficiency of the Agency.[40]

The regulation also lists procedures that "[n]ormally" will govern separations from the CIA, but cautions

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[38] *Id.* at 915.

[39] *See Service v. Dulles*, 354 U.S. 363 (1957).

[40] CIA Regulation HR 20-27(j), *reprinted in* J.A. 35.

that these procedures need not be followed for terminations made pursuant to section 102(c):

> [Procedures] should be followed insofar as practicable, but there may be circumstances of a case that make these procedures impractical or undesirable, and the case should be handled in a manner conforming to the circumstances. Moreover, to meet the responsibilities placed upon the Agency and pursuant to statutory authority, *any employee may be separated immediately and without regard to any suggested procedural steps when the Director of Central Intelligence considers it necessary or advisable in the interests of the United States.*[41]

This disclaimer is reiterated later in the regulation:

> In some other cases, the following modified procedures apply:
>
> . . . .
>
> (c) Pursuant to statutory authority, the Director of Central Intelligence may separate an employee directly when necessary or advisable in the interests of the United States.[42]

We cannot imagine how the CIA could have more plainly expressed its intent to protect the discretion granted it by section 102(c). Doe's arguments to the contrary are simply without merit. The District Court ruled that the exception for terminations necessary or advisable in the interests of the United States applies only when urgency prevents the application of procedural protections:

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[41] *Id.* 20-27m (emphasis added).

[42] *Id.* 20-27m(8).

> While section 27m provides that an employee "may be separated immediately and without regard to any suggested procedural steps when the Director . . . considers it necessary or advisable in the interest [sic] of the United States" the immediacy and urgency of Doe's employment status is belied by the fact that his voluntary disclosures were made in January 1982, but it was not until five months later—May 1982, that the Director decided to fire him.[43]

This reasoning cannot stand, however, because "immediacy" is not a requirement that must be satisfied before the procedures otherwise provided by the regulations become inapplicable. Rather, if a termination is "necessary or advisable in the interests of the United States," the termination can be made "without regard to *any suggested procedural steps*" and, in addition, the termination "*may*" be immediate. The immediate separation discussed in the regulation is an optional course of action available to the Director that he or she need not exercise.

The cases cited by Doe and the District Court are equally inapposite. In *Ashton v. Civiletti*,[44] an FBI Handbook informed agency employees that they could "assume that [their] position[s] [are] secure, if [they] continue to do satisfactory work;" and the FBI Handbook contained no exceptions for particular types of terminations as found in the CIA regulations. The court in *Ashton* did, however, emphasize that—like the CIA—the FBI distinguished between probationary and nonprobationary employees:

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[43] *Doe v. Casey*, 601 F. Supp. 581, 587 n.4 (D.D.C. 1985).

[44] 613 F.2d 923 (D.C. Cir. 1980).

> In the absence of any special definition [of probation], appellant could only be expected to comprehend it in its normal meaning—that he was required to serve an initial proving period in which his performance could be tested and, if his employer was dissatisfied, in which he could be fired without ceremony. A probationary period, of course, would be unnecessary if the employer could dismiss a nonprobationary employee at any time and for any reason.[45]

Although the CIA also has a "probationary period," it—unlike the FBI—*does* give "probation" a "special definition" in its regulation. A termination during this period has its own set of procedures and standards.[46] This *same* regulation, however, explicitly exempts terminations that are "necessary or advisable in the interests of the United States" from *any* procedural requirements.

Similarly, *Matlovich v. Secretary of the Air Force*[47] is not applicable. In that case, this court ordered the Air Force to explain the termination of a homosexual Air Force airman. The court noted, however, that unlike the CIA, the "Air Force regulation expressly contemplates that exceptions can be made to the general policy of separating homosexuals;"[48] it was because the regulation expressly contemplated such exceptions that we concluded that the Air Force must provide a reasoned explanation

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[45] *Id.* at 929.

[46] *See* CIA Regulation HR 20-27(a); 20-27m(8)(b) ("In the case of separation during the trial period, the procedures of paragraph a are to be followed."), *supra* note 40.

[47] 591 F.2d 852 (D.C. Cir. 1978).

[48] *Id.* at 855.

for not making such an exception in an individual case.[49] The CIA regulation quite simply includes no such explicit exception.

We conclude, therefore, that the CIA regulation provides no independent source of procedural or substantive protections. Doe must look to section 102(c) itself or to the Constitution.

C. *Termination of Doe's Employment*

The APA provides the appropriate standard for our review of Doe's termination pursuant to section 102(c). We must uphold the Director's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[50] At the outset it is critical that we emphasize the broad discretion granted the Director of Central Intelligence by section 102(c). The Director is responsible for one of the most sensitive agencies in the federal government; the keen interest of foreign intelligence agencies in the inner workings of the CIA is obvious. Congress accordingly recognized the need for the Director to have broad power to terminate CIA personnel for even the slightest security risk. The necessity for judicial deference to the judgments of the Director is further highlighted by the difficult nature of the decisions the Director must make. Judgments about the security of the CIA require an expertise unique to those in the intelligence community. As the Supreme Court recently noted in *CIA v. Sims*,[51] "[t]he decisions of the Director, who must of course be familiar with 'the whole picture,' as

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[49] *Id.* at 859.

[50] 5 U.S.C. § 706(2)(A) (1982).

[51] 105 S. Ct. 1881 (1985).

judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake." [52] Moreover, our review must be circumspect because "[i]t is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency." [53]

We conclude, therefore, that although judicial review of the Director's judgments is not precluded, we must apply the arbitrary and capricious standard in the context of this statute which leaves the decision to terminate CIA employment largely to the expertise and judgment of the Director. As a practical matter, therefore, our main concerns will be the *arguable* infringement of constitutional rights and the possibility that the Director has acted in excess of statutory authority, rather than the wisdom of the termination itself.[54]

Unfortunately, there is great confusion as to precisely what the Director intended to do in this case.

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[52] *Id.* at 1893.

[53] *Id.*

[54] In cases involving challenges to agency failures to institute rulemaking we have similarly declined to find a preclusion of review, but have exercised only a narrow scope of review. *See WWHT, Inc. v. FCC*, 656 F.2d 807, 809 (D.C. Cir. 1981) ("[W]e hold that, except where there is evidence of a 'clear and convincing legislative intent to negate review,' . . . an agency's denial of a rulemaking petition is subject to judicial review. However, we believe that the decision to institute rulemaking is one that is largely committed to the discretion of the agency, and that the scope of review of such a determination must, of necessity, be very narrow.") (quoting *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979)).

We see three possible explanations for the Director's action:

> (1) The Director may have intended to invoke section 102(c) without giving any reasons at all for the termination of Doe's employment;
>
> (2) The Director may have intended to terminate Doe as part of a ban against the employment of all homosexuals; or
>
> (3) The Director may have dismissed Doe because *Doe's* homosexuality presented a security risk.

As we discuss below, the resolution of this case depends critically on which of these explanations is applicable. Because of the confusion surrounding the Director's reasoning, we must remand the case to the District Court for further proceedings.

1. *Invocation of Section 102(c) Without Giving Reasons*

It may be—albeit unlikely—that the Director terminated Doe's employment for reasons wholly unrelated to Doe's homosexuality. We strongly doubt that this is the case because the CIA displayed no concern about Doe's employment until it was made aware of Doe's homosexuality; and, as we read the record, the clear focus of the CIA's inquiry before the Director decided to terminate Doe's employment was Doe's homosexuality. Because the record is unclear on this point, however, we leave the task of deciding whether the Director fired Doe for other unstated reasons to the District Court.

If the Director intends to invoke section 102(c) without giving any reasons at all, a plaintiff must

point to something concrete in the record suggesting that section 102(c) is being used as a sham before a court requires the Director to explain his decision to fire the employee. The plaintiff must, for example, point to evidence of an impermissible basis —such as sex, race, hair color, etc.—for the termination. Given the sensitive nature of the CIA's mission, and the risk that merely explaining why information must be withheld "can convey valuable information to a foreign intelligence agency,"[55] we cannot permit a "witchhunt" aimed at discovering the reasons for the invocation of section 102(c). Quite simply, we could endanger national security interests if we were to require the CIA to explain each and every decision to terminate the employment of an employee.

We must operate under a presumption that the CIA is acting lawfully and in good faith in any invocation of section 102(c), unless the plaintiff gives adequate reason to believe otherwise. Only if a plaintiff offers a basis for suspicion that the Director terminated the plaintiff's employment for an impermissible reason will we require the Director to justify his or her decision. In the instant case, Doe has not even alleged concrete evidence of an impermissible ground unrelated to his homosexuality for the invocation of section 102(c). Thus, we hold that if the Director intended to invoke section 102(c) without reasons in this case, there are no grounds to reverse the Director's decision to terminate Doe's employment and, correspondingly, no bases for requiring the Director to explain his exercise of discretion under section 102(c).

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[55] *Sims*, 105 S. Ct. at 1893.

2. *Bar Against All Homosexuals*

Alternatively, the Director may have intended to terminate Doe's employment as part of a CIA policy barring the employment of all homosexuals. The record is somewhat confusing on this point. Doe was not immediately discharged by the CIA; instead, he underwent extensive polygraph examination. This suggests that his mere status as a homosexual was not the reason for his later discharge. Furthermore, Doe's counsel was informed by officials in the CIA General Counsel's Office that decisions to terminate homosexuals would be made on a case-by-case basis. On the other hand, however, Doe was told by several security officers that homosexuality violated CIA rules. Thus, it is unclear to us whether Doe's termination reflects a policy of terminating the employment of all homosexuals. We will leave this issue for resolution by the District Court.

If the District Court concludes that the CIA intended to bar all homosexuals, there is an *arguable* claim that can be litigated. Although this circuit's decision in *Dronenburg v. Zech*,[56] and the Supreme Court's recent decision in *Bowers v. Hardwick*,[57] hold that homosexual *conduct* is not constitutionally protected, they did not reach the difficult issue of whether an agency of the federal government can discriminate against individuals merely because of sexual *orientation*. At the very least, the CIA would have to justify why such a ban on the employment of all homosexuals was "necessary or advisable in the interests of the United States."

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[56] 741 F.2d 1388 (D.C. Cir. 1984).

[57] —— U.S. ——, 54 U.S.L.W. 4919 (U.S. June 30, 1986).

3. *Termination Because of Doe's Homosexuality*

Finally, the Director may have dismissed Doe because *Doe's* homosexuality presented a security risk. Although we do not believe that this would present any colorable substantive constitutional claim, if this were the case Doe may have a claim that the CIA deprived him of his liberty interest in reputation without due process.

In *Board of Regents v. Roth*,[58] the Supreme Court concluded that a government employee's liberty interests are impaired when the government makes a charge against the employee that damages "his standing and associations in the community" or "impose[s] on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."[59] An injury to reputation alone, however, is not sufficient to give rise to a colorable liberty interest claim. Instead, a court analyzing a claim of a deprivation of a liberty interest must satisfy itself that a plaintiff has met *two* requirements. First, the government must have altered the "status" of the employee in some tangible way by, for example, discharging the employee, foreclosing the employee's future employment opportunities, or reducing the employee's rank or pay.[60] Second, this change in "status" must be accompanied by

[58] 408 U.S. 564 (1972).

[59] *Id.* at 573.

[60] *See Paul v. Davis*, 424 U.S. 693, 711 (1976); *Mosrie v. Barry*, 718 F.2d 1151, 1161 (D.C. Cir. 1983). For purposes of a *liberty* interest claim, it is not relevant that the public employee's job did not constitute a property interest. *See Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1106-07 (D.C. Cir. 1985).

injury to the employee's good name, reputation, honor or integrity, or by the imposition of a similar stigma.[61]

There is little question that the first requirement —a change in status—is satisfied in this case. The loss of government employment is the paradigmatic "status change" in liberty-interest jurisprudence.[62] Satisfaction of the second requirement is more problematic. In order for Doe to assert the deprivation of a liberty interest, he must establish that the CIA has stigmatized him and that the stigma "has hampered future employment prospects" or injured his good name.[63] If the CIA had merely declined to give Doe a security clearance for unspecified reasons, we doubt whether the second requirement would be satisfied. In *Molerio v. FBI*,[64] we held that the decision of the FBI not to hire an applicant because of security clearance problems did not violate the applicant's due process rights:

> To receive a "top secret" clearance is assuredly a badge of loyalty; but to be denied it on *unspecified grounds* in no way implies disloyalty or any other repugnant characteristic—as is shown by the evidence in this case that the mere fact that one has relatives in a hostile country may be considered a basis for denial.[65]

Doe, however, was not denied a security clearance "on unspecified grounds." Instead, the CIA will in-

[61] *Doe v. United States Dep't of Justice*, 753 F.2d at 1105.

[62] *See, e.g., id.* at 1106-08; *Mosrie*, 718 F.2d at 1161-62.

[63] *Doe v. United States Dep't of Justice*, 753 F.2d at 1111.

[64] 749 F.2d 815 (D.C. Cir. 1984).

[65] *Id.* at 824 (emphasis added).

form Doe's future employers that he presents a security risk *because of his homosexuality*. Because Doe himself does not view homosexuality as stigmatizing—and indeed, admits that he is a homosexual—he would have no liberty interest claim if *all* homosexuals were banned from CIA employment.[66] If, on the other hand, the CIA terminated Doe because *his* homosexuality presented a unique security risk not necessarily presented by all other homosexuals, we must conclude that the statement is sufficiently stigmatizing to give rise to a colorable liberty interest claim. If the CIA alleges that something unique about Doe's sexual conduct makes him undesirable for sensitive government work, the inevitable result is that Doe is foreclosed from employment in the field in which he has been especially trained. As a practical matter, Doe will be unable to obtain employment whenever a security clearance is required.[67]

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[66] *See Beller v. Middendorf*, 632 F.2d 788, 806 (9th Cir. 1980) (when "real stigma imposed by the Navy's action . . . is the charge of homosexuality," which plaintiffs admit, there is no deprivation of liberty), *cert. denied*, 452 U.S. 905 (1981).

[67] While it may be true that other agencies and private employers will make their own determination of Doe's security risk, as a practical matter, we find it inconceivable that other agencies would second-guess such a determination by the CIA. At the very least, the potential foreclosure of economic opportunities is as great as that found to violate liberty interests in recent cases in this circuit. *See, e.g., Doe v. United States Dep't of Justice*, 753 F.2d at 1112-13 & n.24 (information in employee's file indicating that employee was terminated for unprofessional conduct and dishonesty gives rise to liberty claim); *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953, 962-66 (D.C. Cir. 1980) ("lack of integrity" charge that was communicated to other government agencies gave rise to liberty interest claim); *see also White v. Thomas*, 660 F.2d 680, 684-85 (5th Cir. 1981) (charge that

Even if the CIA deprived Doe of his liberty interest in his reputation, however, our inquiry is not at an end. The due process clause requires that the CIA not deprive Doe of his liberty interest *without due process of law*. We must therefore determine whether Doe received the process he was due. Doe was entitled to an opportunity to refute the charges and "clear his name."[68] The sole purpose of this "name-clearing hearing" is to do just that—give the employee an opportunity to clear his or her name. This name-clearing hearing need not be formal; the fundamental requirement is that Doe have an opportunity to be heard in a meaningful manner.[69] As the Seventh Circuit explained,

> In its essence, a hearing demands that the person have the right to support his allegations by argument, however brief, and if necessary, by proof, however informal.[70]

We conclude that Doe was given a meaningful opportunity to contest any allegation that his homosexuality presented a security risk—indeed, a meaningful opportunity that Doe and his counsel vigorously pursued. Doe had notice that the CIA was seriously concerned about his homosexuality. The CIA furthermore permitted Doe to examine the polygraph officer's report, and to submit lengthy written argu-

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employee lied on his employment application gave rise to liberty interest due process claim), *cert. denied*, 455 U.S. 1027 (1982).

[68] *Codd v. Velger*, 429 U.S. 624, 627 (1977).

[69] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[70] *Endicott v. Huddleston*, 644 F.2d 1208, 1216 (7th Cir. 1980).

ments on his behalf. Finally, Doe makes no allegation that either the Office of Security or the Director of Central Intelligence were biased.[71] In the context of a very sensitive agency such as the CIA, we cannot say that the Constitution requires more.[72]

III. Conclusion

Section 102(c) terminations are subject to judicial review. Because the statute leaves the decision of whether an individual's employment should be terminated as "necessary or advisable in the interests of the United States" largely to the discretion of the Director of Central Intelligence, however, judicial review must be deferential. The District Court erred by showing insufficient deference to the judgment of the Director. However, because the record is unclear on certain critical points that may have a bearing on Doe's claims for relief, we remand this case for further proceedings consistent with this opinion.

So ordered.

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[71] *See, e.g., Staton v. Mayes*, 552 F.2d 908, 913-14 (10th Cir.) (finding potential due process violation because of biased decisionmaker), *cert. denied*, 434 U.S. 907 (1977).

[72] Similar informal procedures have been upheld. *See, e.g., Campbell v. Pierce County*, 741 F.2d 1342, 1345-46 (11th Cir. 1984) (rejecting liberty interest due process claim when plaintiff had notice and the opportunity to rebut claims of insubordination and mishandling of funds), *cert. denied*, 105 S. Ct. 1754 (1985); *Endicott*, 644 F.2d at 1216 (rejecting requirement that government call witnesses whom the employee's counsel could cross-examine).

Ginsburg, *Circuit Judge, concurring*: The careful reader of the opinions in this case will find that the two sides part company widely only at the last step of the way. First, both sides agree that the "wisdom" of the Director's employment termination decisions is not for courts to judge. Majority Opinion at 24; *see id.* at 23-24 (court presumes Director "is acting lawfully and in good faith" unless plaintiff "point[s] to evidence of an impermissible basis—such as sex, race, hair color, etc.—for the termination"). Second, both sides also agree that there is, indeed, a "role" for the court to play. *See* Partial Dissent at 18-19. The dissent, although more reservedly than the majority, recognizes that the court's review legitimately extends to the question whether "the Director has acted in excess of statutory authority." Majority Opinion at 22; *see* Partial Dissent at 18 (acknowledging the court's legitimate function, when its review authority is invoked, "to ensure that the Director acted within the bounds of his statutory authority").

The majority, but apparently not the dissent, regards it as the province of the court to entertain arguable claims of constitutional rights. *See* Majority Opinion at 22, 24-25. While both sides would review to keep the Director within the bounds of ordinary legislation, the dissent, it seems, would not necessarily extend court review to the Director's compliance with the nation's highest law. I find the dissent's stopping point curious, and not persuasively explained. Whether a court may review at all, and how it should rule if it does review, of course, are discrete questions. *Cf. Johnson v. Robison*, 415 U.S. 361 (1974) (statute precluding judicial review of Veterans' Administration decisions did not bar court consideration of constitutional claims—Court went on to decide merits against plaintiff).

BUCKLEY, *Circuit Judge, concurring in part and dissenting in part*: I concur in sections II(B) and II(C)(3) of the majority opinion, which hold (a) that CIA regulations provide no procedural or substantive rights beyond those granted under section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c) (1982); and (b) that as Doe has been accorded all the process that is his due, he has not been deprived of a liberty interest without due process of law. Nevertheless, because the majority ignores the obvious legislative intent in section 102(c) to shield the Director's employee termination decisions from judicial review. I must dissent from the balance of the opinion.

As the majority notes, there exists a strong presumption that agency actions are reviewable. *See, e.g., Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). Judicial review is unavailable, however,

> to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

Administrative Procedure Act ("APA") section 10(a), 5 U.S.C. § 701(a) (1982). Disregarding Supreme Court case law and this court's own precedent, the majority overstates both the conclusiveness of the presumption of reviewability and the difficulty of establishing the section 10(a) exceptions. Furthermore, by ignoring the plain meaning and objectives of section 102(c), the majority manages to avoid what should be the obvious conclusion that that statute both precludes judicial review within the meaning of section 10(a)(1) and commits termination decisions to the nonreviewable discretion of the Director

of the CIA ("Director") within the meaning of section 10(a)(1) and commits termination decisions to the nonreviewable discretion of the Director of the CIA ("Director") within the meaning of section 10(a)(2).

I. STATUTORY PRECLUSION

A. *The Standard for Finding Preclusion*

To support its holding that judicial review of a section 102(c) termination decision is not precluded by statute, the majority relies on cases such as *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), and *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), which speak of a "strong presumption" of reviewability, overcome only by "clear and convincing evidence" of congressional intent to preclude review. Since issuing these opinions, however, the Supreme Court has made significant refinements in its preclusion analysis which, in its reliance on the older precedents, the majority has failed to apply.

In *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), the Supreme Court reversed this court's holding that an agency action was subject to judicial review. In finding judicial review unavailable, the Court articulated three refinements of its earlier analysis. First, the Court emphasized that the presumption of reviewability is rebuttable:

> The presumption favoring judicial review of administrative action is just that—a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by . . . reliable indicator[s] of congressional intent.

Id. at 349. Second, the Court indicated some permissible sources from which to infer such intent:

> Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

Id. at 345. Finally, the Court described the evidentiary standard to be applied in determining the existence of a congressional intent to preclude review:

> In the context of preclusion analysis, the "clear and convincing evidence" standard is not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.

Id. at 351. This presumption is overcome, however,

> whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.

Id. (citations omitted).

Subsequent Supreme Court cases have reaffirmed the *Block* analysis. *See Lindahl v. Office of Personnel Management*, 105 S. Ct. 1620, 1627 (1985) ("[T]he 'clear and convincing evidence' standard has never turned on a talismanic test." Rather, preclusion may be found in a statute's "express language, . . . the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."); *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2137 (1986).

Thus, although the Director's termination of Doe pursuant to section 102(c) is presumptively reviewable, this presumption is rebutted if the congressional intent to preclude review is "fairly discernible" from the face of the statute, the statutory scheme, the statute's objectives, the legislative history, or from the nature of the administrative action here involved. The demonstration of this congressional intent must be "clear and convincing," but not in a strict evidentiary sense; rather, the presumption comes into play "where substantial doubt" about that intent exists. In essence, the teaching of *Block* and subsequent cases is that the courts should not be hostile to congressional preclusion of judicial review of particular administrative actions, but should conduct an objective assessment of all relevant sources in order to determine what it is that Congress in fact intended.

B. *The Standard Applied By The Majority*

Notwithstanding the straightforward inquiry into congressional intent espoused in *Block*, the majority extracts three principles from Supreme Court precedent that serve to accentuate the difficulty of establishing preclusion.

The majority first requires that congressional intent to preclude judicial review be established by "clear and convincing evidence." (Majority Opinion at 8). While conceding *Block*'s holding that this is "not a rigid evidentiary test," the majority nevertheless manages to add a little starch to that case's holding. The majority cites *Block* in support of the proposition that the congressional intent to preclude review must "*at the very least*, . . . be "fairly dis-

cernible' in the detail of the legislative scheme." *Id.* at 9 (emphasis added). In fact, in *Block*, the Supreme Court went no further than to hold that a sufficiently "clear and convincing" showing is made "*whenever* the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme,' " 467 U.S. at 351 (emphasis added).

The majority's second principle states that "when the statute at issue specifies a standard that at least purports to limit agency discretion . . . , this is highly probative evidence that Congress did not intend to preclude judicial review." (Majority 0pinion at 9). In support of this proposition, the majority cites *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455-56 (1979), in which the Supreme Court held an Interstate Commerce Commission decision nonreviewable, relying in part on the fact that the statute authorizing the decision "is silent on what factors should guide the Commission's decision." The problem here is that while a lack of statutory standards may well support an inference of nonreviewability, this hardly supports the inverse proposition that the presence of standards implies reviewability. Not all standards, after all, demand, or are capable of, judicial application.

As its third principle, the majority asserts that congressional intent to preclude judicial review may be inferred from the statutory scheme "only in a very limited category of cases involving uniquely complex or otherwise delicately balanced statutory schemes." (Majority Opinion at 10). While it is true that in *Block* the Supreme Court relied on the details of the complex statutory scheme to infer a congressional intent to preclude review, 467 U.S. at 349, the Court has never intimated that a simpler statutory scheme

would not support the same inference. In any case, the majority's insistence on complexity or delicacy of balance simply obscures the fact that the statutory scheme is but one of several elements identified by the Court in *Block* from which congressional intent might be inferred.

Having defined its own restrictive standards for finding statutory preclusion, the majority has little difficulty in ignoring the clear indications that Congress intended section 102(c) decisions to be nonreviewable.

C. *Indicators of Congressional Intent to Preclude Review Of Section 102(c) Termination Decisions*

1. The Statutory Language

On its face, section 102(c) clearly indicates a congressional intent to prohibit judicial review. The relevant portion of section 102(c) provides:

> Notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States.

As demonstrated below, the "notwithstanding" clause provides "clear and convincing" evidence of the congressional intention to prohibit judicial review.

Section 102(c) was enacted at a time when federal personnel actions were not subject to judicial review. *United States v. Testan*, 424 U.S. 392, 406 (1976). Congress, however, had adopted the Lloyd-LaFollette Act granting federal employees limited

employment and procedural protections. 5 U.S.C. § 652 (1964), ch. 389, § 6, 37 Stat. 539, 555 (1912); *recodified as* 5 U.S.C. § 7501. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 527-28 (1966); *subsequently replaced by* 5 U.S.C. § 7501 *et seq.* (1980), Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1134 *et seq.* (1978). Under that Act, a federal employee could be removed only "for such cause as will promote the efficiency of [the] service," and he was granted the right to receive written notice of any charges against him, to file a written answer to those charges, and to receive a prompt written decision in response to that answer. Any further procedures, such as examination of witnesses, trial, or hearing were available only at the discretion of the agency official seeking the employee's removal. With the adoption of section 102(c), CIA employees were stripped of even these limited rights and became subject to summary termination without a statement of reasons or opportunity to protest.

The majority nevertheless ignores section 102(c)'s elimination of the procedural protections of the Lloyd-LaFollette Act and focuses instead on the substantive provision prohibiting the dismissal of an employee "except for such cause as will promote the efficiency of the service." As a result, the majority is able to dismiss the elimination of Lloyd-LaFollette protections as "merely replac[ing] one set of standards—the more rigorous efficiency standards . . .—with a new, more relaxed standard: that the termination be 'necessary or advisable in the interests of the United States.'" (Majority Opinion at 12). Thus, argues the majority, the resulting expansion in the Director's discretion does not impiy a preclusion of judicial review. *Id.*

The essential flaw in the majority's reasoning is its failure to recognize that the Director's termination decisions are insulated by section 102(c) from the procedural as well as the substantive provisions of the Lloyd-LaFollette Act. Thus, it finds itself in the untenable position of insisting that terminated CIA employees retain the right to judicial review even though Congress has stripped them of the minimal procedural rights of a statement of charges and a chance to respond.

The majority's holding that section 102(c) does not preclude judicial review relies significantly on its conclusion that the section "provides a standard" that constrains the Director's discretion. As discussed in section II(A) below, the majority arrives at this conclusion by misreading section 102(c) to require that the discharge of a particular employee actually be in the national interest. All that the statute prescribes, however, is that the Director *deem* it to be. Thus, the majority fails to draw the necessary distinction between judicial confirmation of the Director's *purpose* in terminating an employee (he deems it in the national interest) and a review of the *correctness* of the belief on which he acts. While a court may satisfy itself as to the former, it may not inquire into the latter. This clear distinction is underscored in *Service v. Dulles*, 235 F.2d 215 (D.C. Cir. 1956), which deals with Department of State Appropriations Act, 1952, ch. 533, § 103, 65 Stat. 575, 581 (1951) (expired at the close of fiscal year 1952), a statute essentially identical to section 102(c), to wit:

> Notwithstanding the provisions of [the Lloyd-LaFollette Act], or the provisions of any other law, the Secretary of State may, in his absolute discretion, . . . terminate the employment of any

> officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

Id. at 216 n.1. In construing the statute, this court cited with approval the following excerpt from the district court's "well-expressed" opinion:

> This Court cannot, of course, review the correctness of the former Secretary of State's determination. Its function is limited to determining whether any procedural requirement of the statute was violated in plaintiff's discharge.
>
> Under [§ 103 of the Appropriations Act] there was one procedural requirement: that the Secretary of State must determine in his discretion that the termination of plaintiff's employment was necessary or advisable in the interests of the United States.

Id. at 218. The court found that this requirement had been satisfied, as evidenced by an affidavit by the Secretary of State stating he had discharged the employee in the exercise of the authority vested in him, *inter alia*, by section 103 of Public Law 188, and it affirmed the lower courts' grant of summary judgment for the government.

The Supreme Court subsequently reversed, *Service v. Dulles*, 354 U.S. 363, 388 (1956), but only because the Secretary had not complied with his own departmental regulations which imposed more exacting procedures for termination than were required by statute. The Court specifically noted that under the statute "the Secretary was not obligated to impose upon himself these more rigorous substantive

and procedural standards." 354 U.S. at 388. Thus, this court's holding in *Service* clearly applies to section 102(c), and dictates a finding of statutory preclusion as to any inquiry beyond the Director's satisfaction of the "procedural requirement" that he deems the termination to be in the national interest.

2. Further Indications of Congressional Intent to Preclude Review

In *Block*, the Supreme Court held that the congressional intent to preclude judicial review within the meaning of section 10(a)(1) could be ascertained not only from the express language of the statute, but also from the statutory objectives and the nature of the administrative action involved. 467 U.S. at 345. In the instant case, these factors clearly confirm a congressional intent to preclude review.

Section 102(c) authorizes the Director to terminate an employee "for such cause as will promote the efficiency of [the] service," and would be required to give such an employee a written copy of the charges against him and an opportunity to answer those charges. The obvious purpose of section 102(c) is to allow the Director to terminate employees unimpeded by these substantive and procedural requirements. Subjecting the Director's decisions to judicial scrutiny flies in the face of this clear legislative purpose.

This conclusion is supported by the nature of the administrative action involved. The summary dismissal authority granted to the Director by the National Security Act of 1947 is a natural and necessary function of the extraordinary sensitivity that surrounds every aspect of our national security op-

erations. The abiding concern for the ability of sensitive agencies to maintain absolute control over personnel is reflected in a 1964 Senate Committee report commenting on the proposed grant to the Secretary of Defense of "summary power . . . to terminate the employment of any employee" of the National Security Agency upon a determination that the exercise of this power was "in the interests of the United States." Citing the fact that identical authority had earlier been granted the Director of the CIA, the report explained:

> The responsibilities assigned to the National Security Agency are so great, and the consequences of error so devastating, that authority to deviate from [proposed procedures providing federal employees with the benefit of conventional procedural protections] should be granted to this agency.

S. Rep. No. 926, 88th Cong., 2d Sess., 2 (1964). It is of course true, as the majority points out, that a Congress has no authority to interpret the meaning of statutes enacted by its predecessors. The passage I have quoted, however, sheds light on the nature of the national security concerns with which successive Congresses have been called upon to deal.

No agency is more sensitive, and few so important to our national safety, as the CIA. As the Supreme Court has pointed out, its effectiveness has been "thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and—in a sense—the free world." *Snepp v. United States*, 444 U.S. 507, 512 n.7 (1980). To safeguard the agency's effectiveness, Congress has given "the Director of Central Intelligence broad power to protect the secrecy and integrity of the

intelligence process. The reasons are too obvious to call for enlarged discussion; without such protections the agency would be virtually impotent." *CIA v. Sims*, 105 S. Ct. 1881, 1888 (1985). Judicial intrusion into the CIA's personnel actions can threaten to express the agency's inner processes and compromise its integrity.

> [T]he very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself. . . . [W]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. . . . It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency. . . . And it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence gathering process.

Id. at 1892-94 (citations omitted). These imperative needs explain why Congress, in 1947, provided the Director with summary power to terminate employees as to whom he had any question while, at the same time, stripping those employees of the only protections they then enjoyed under federal law.

In sum, the explicit language of section 102(c), the clear statutory objectives, and the nature of the administrative action here involved all lead to the

inescapable conclusion that Congress intended to preclude judicial review of the Director's exercise of his authority under that section.

II. Commitment to Agency Discretion

Even absent these clear and convincing indications of congressional intent, the court should nevertheless hold the Director's decision shielded from judicial review because section 102(c) commits this decision to the Director's discretion within the meaning of section 10(a)(2). The majority avoids this conclusion first by reading non-existent constraints into the section 102(c) grant of termination authority, and then by ignoring this court's precedents sanctioning a less restrictive standard for finding a commitment to agency discretion.

A. *The Majority's Overstatement of the Constraints Section 102(c) Imposes on the Director's Exercise of Discretion*

In order to support its holding that section 10(a)(2) does not prohibit judicial review of the Director's exercise of authority under section 102(c), the majority overstates the constraints the latter imposes on the Director's discretion.

In the first place, the majority misstates section 102(c) by asserting that it establishes a standard requiring "that terminations be 'necessary or advisable in the interests of the United States.'" (Majority Opinion at 13). From this misreading, the majority concludes that "section 102(c) requires that an employee be terminated *only* if the termination advances the interests of the United States." (Majority Opinion at 15) (emphasis in the original). Thus, the door is opened to at least limited

scrutiny into the merits of the Director's decision. The statute, however, does not read that way. Far from requiring that a particular termination in fact advance the national interest, section 102(c) goes no further than to authorize the Director "*in his discretion*" to terminate any employee "whenever *he* shall deem such termination necessary or advisable in the interests of the United States." (emphasis added). Thus the operative requirement is that the Director *believe* that the termination safeguards the interests of the United States and not (as the majority suggests) that it do so in fact.

Moreover, the statutory language cannot be read to authorize a court to inquire into the reasons for the Director's decision to terminate an employee because that decision is delegated to his discretion alone. As this court held in *Service v. Dulles, supra*, the judicial function is limited to a determination that the statute's "procedural requirements" have been met; namely, that the decision to terminate was in fact based on the *Director's* assessment of the national interest. Beyond that, we cannot inquire.

One obvious purpose of section 102(c) is to allow the Director to act upon unsubstantiated impressions "when he shall deem" it in the national interest to do so. This represents, of course, an unusually broad delegation of authority. It was, however, the judgment of Congress that the Director should have that latitude, and it is not for this court to second-guess that judgment.

B. *The Majority's Failure to Apply this Court's Precedents Regarding the Standard for Finding Commitment to Agency Discretion Within the Meaning of Section 10(a)(2)*

Based on its finding that section 102(c) establishes a standard that constrains the Director's exercise of his discretion in terminating employees, the majority holds that the Director's decisions are judicially reviewable. This holding is premised on the notion that the "committed to agency discretion" exception applies *only* when "a court would have no meaningful standard" to apply (Majority Opinion at 14); this notion, however, applies too narrow a reading of the Supreme Court's interpretation of section 10(a)(2), and directly contravenes this court's own precedents.

In support of the proposition that section 10(a)(2) applies only where there is "no law to apply" (Majority Opinion at 14), the majority cites *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 410, and *Heckler v. Chaney*, 105 S. Ct. 1649, 1655 (1985). In those cases, however, the Supreme Court held only that section 10(a)(2) "is a very narrow exception" and that it is "applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply," or so drawn that "a court would have no meaningful standard against which to judge the agency's exercise of discretion." Nowhere does the Court state that this exception applies *only* in those cases.

The majority simply ignores this court's cases holding that section 10(a)(2) is evoked not only by the absence of applicable standards, but also by certain pragmatic considerations. In *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043-

44 (D.C. Cir. 1979), this court held that the application of section 10(a)(2)

> necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review. . . . In making this determination, we . . . evaluate the relevance of three particularly important factors: the need for judicial supervision to safeguard the interests of the plaintiffs; the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and the appropriateness of the issues raised for judicial review. . . . Finally, we inquire whether the considerations in favor of nonreviewability thus identified are sufficiently compelling to rebut the strong presumption of judicial review.

Accord, Local 1219, AFGE v. Donovan, 683 F.2d 511, 515 (D.C. Cir. 1982) (Section 10(a)(2) "shields from review only those matters for which a 'fair appraisal of the legislative scheme, including a weighing of practical and policy implications of reviewability, persuasively indicates that judicial review should be circumscribed.'" (citation omitted)).

An assessment of the "pragmatic considerations" in the instant case, including "the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role," clearly weighs against judicial review of the Director's section 102(c) decisions.

As the Supreme Court observed when dealing with a different section of the National Security Act of 1947:

> The decisions of the Director, who must of course be familiar with "the whole picture," as

> judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake. It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency.

CIA v. Sims, 105 S. Ct. at 1893. Here, of course, we are dealing not with a question of deference but of judicial competence. To intrude however deferentially into the Director's most sensitive personnel decisions entails the inevitable risk of unwittingly compromising national intelligence operations through the forced disclosure of information whose possible significance a court is not capable of assessing.

Whether or not such a danger exists in this particular case, the majority would establish a precedent that would force the Director now or in the future to risk the public airing of agency policies and concerns as well as the particular information upon which a specific termination decision is based. This would tend to compromise the CIA's vital, congressionally-mandated functions. These pragmatic considerations "are sufficiently compelling to rebut the strong presumption of judicial review." *Natural Resources Defense Council*, 606 F.2d at 1044.*

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* In support of its position that such pragmatic concerns need not be considered, and that the presence of a judicially manageable standard is the only issue relevant to the applicability of section 10(a)(2), the majority cites two cases from this court, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc), and *Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985). These cases, however, are both distinguishable. Neither case involved an agency with a sensitive, national security-related mission, and in neither did judicial review pose the threat of disrupting "the effectiveness of the agency in carrying out its congressionally assigned role." *Natural*

Even accepting, for the sake of argument, the majority's narrow position that section 10(a)(2) applies only when there is "no law to apply," judicial review is nevertheless precluded. Section 102(c) represents one of those "very narrow exceptions" where "there is no law to apply." It is in fact drawn in such a manner that "a court would have no meaningful standard against which to judge" the Director's exercise of his statutory discretion. It bears repeating that the operative standard here is not whether the termination of a particular employee serves the national interest (as the majority maintains), but whether the Director believes it does. In the murky world in which the CIA must operate, one deals as often as not with intuitions as well as with provable facts, and a judge's perception of the national interest could be light years away from that of the Director called upon to make the critical judgments in the discharge of his special responsibilities. Given the nature of the discretion the Director is required to exercise, where is the law to be applied, where the meaningful standard against which any judge can take the measure of his performance?

It is noteworthy that in not a single case cited by the majority in support of judicial review of the exercise of agency discretion did the challenged decision involve considerations of national security: *e.g.*,

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Resources Defense Council, 606 F.2d at 1044. In fact, in both cases the court emphasized that its scrutiny would not interfere with agency functioning. 480 F.2d at 1162; 780 F.2d at 47.

The majority also cites *Local 1219, AFGE v. Donovan*, but far from supporting the majority's narrow reading of section 10(a)(2), that case directs the court to weigh the "practical and policy implications of reviewability." 683 F.2d at 515.

Citizens to Preserve Overton Park (highway planning); *Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985) (shelter for the homeless); *Local 1219, AFGE v. Donovan*, 683 F.2d 511 (D.C. Cir. 1982) (settlement agreement between the Department of Labor and a federal employees' union resolving charges of unfair election procedures); *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981) (FCC denial of rulemaking petition); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (school desegregation); *State of Fla. v. United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1186 (1986) (Government aquisition of land to be held in trust for Indian tribe); *Wong Wing Hang v. INS*, 360 F.2d 715 (2d Cir. 1966) (denial of application for suspension of deportation). Nor does a single case relied upon by the majority involve a situation where judicial review could pose the threat of disrupting "the effectiveness of the agency in carrying out its congressionally assigned role."

Because judicial review would tend to be sufficiently disruptive of the CIA's mission to rebut the presumption of reviewability, and because section 102(c) imposes no substantive constraints on the Director's exercise of his discretion and provides no meaningful standard for a court to apply, the Director's action is committed to his discretion within the meaning of section 10(a)(2) and is not subject to review.

III. Arguable Constitutional Rights

Having decided that section 102(c) does not preclude judicial inquiry into the Director's rationale for terminating an employee, the majority proceeds

to explore alternative explanations for the Director's action in search of one that might constitute an "*arguable* infringement of constitutional rights" (Majority Opinion at 22) (emphasis in the original). It found one (at least to its own satisfaction) in the possibility that the termination of Doe might have been "part of a ban against the employment of all homosexuals." *See* Majority Opinion at 24-25. While the majority concedes that the Supreme Court in *Bowers v. Harwick*, —— U.S. ——, 54 U.S.L.W. 4919 (U.S. June 30, 1986), and this court in *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), have held that homosexual conduct is not constitutionally protected, it argues that these courts did not reach "the difficult issue of whether an agency of the federal government can discriminate against individuals merely because of sexual *orientation*" (Majority Opinion at 25) (emphasis in the original).

Accordingly, the majority remands the case with instructions to the district court (as I understand them) to determine whether the CIA has a policy of terminating the employment of all homosexuals. Presumably, if such a policy were found, the issue would then arise whether homosexual orientation, as opposed to homosexual conduct, is constitutionally protected. (Majority Opinion at 24-25).

At this point it is well to remind ourselves of what the Supreme Court described, in *Sims*, as "the harsh realities of the present day." 105 S. Ct. at 1891. In few areas of our national life can a single mistake lead to such calamitous consequences as in our national security services; in few areas are those in responsibility under such a heavy obligation to avoid the slightest identifiable risk. As one who shares the belief that the Constitution is not a sui-

cide pact, I cannot agree that an intelligence agency is even arguably precluded from adopting a policy banning the employment of members of any class which the Director might deem to be more susceptible to blackmail than the average. Nor may we assume (as the majority apparently does) that every constitutional inquiry will suffice to override a congressional decision to preclude judicial review for reasons of national security. Be that as it may, neither that issue nor the majority's hypothetical is before us, and the plain meaning of section 102(c) precludes the kind of judicial fishing expedition on which the majority proposes to dispatch the district court.

IV. Remaining Judicial Role

Judicial review of the Director's section 102(c) decision to terminate Doe's employment is unavailable under either section 10(a)(1) or section 10(a)(2). The only legitimate role remaining for this court is to ensure that the Director acted within the bounds of his statutory authority, *i.e.*, that his decision to terminate Doe's employment was in fact based upon *his* appraisal that "such termination [was] necessary or advisable in the interests of the United States." This is precisely the role to which this court limited itself in finding that the Director had acted within his authority in *Torpats v. McCone*, 300 F.2d 914 (D.C. Cir.), *cert. denied*, 371 U.S. 886 (1962). *See also Service v. Dulles*, 235 F.2d 215.

In the instant case, as in *Torpats*, the record contains the Director's sworn statement that "[a]fter careful consideration of the matter, [the Director] determined that the termination of Mr. Doe's employment was necessary and advisable in the interests of the United States." This statement suffices to require our holding "that the Director acted within the authority conferred upon him by Congress . . . ." 300 F.2d at 915.

As this comprises the extent of the legitimate inquiry, this case should be remanded to the district court with instructions to dismiss.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

Civil Action No. 82-02016

No. 85-5291

JOHN DOE

v.

WILLIAM J. CASEY,
DIRECTOR, C.I.A., APPELLANT

[Filed Sept. 17, 1986]

Before: EDWARDS, GINSBURG, and BUCKLEY, Circuit Judges.

ORDER

It is ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by Circuit Judge Edwards on August 1, 1986 be, and hereby is, amended as follows:

Page 7, line 4, change "10(a)" to "701(a)"

Page 7, line 13, change "10" to "701"

Page 10, line 3, change "10(a)(2)" to "701(a)(2)"

Page 10, line 5, change "10(a)(2)" to "701(a)(2)"

Page 10, lines 5-6, change "10(a)(1)" to "701(a)(1)"

Page 10, footnote 18, change "10(a)(2)" to "701(a)(2)"

Page 13, line 13, change "10(a)(1)" to "701(a)(1)"

Page 13, line 14, change "10(a)(2)" to "701(a)(2)".

And it is,

FURTHER ORDERED, by the Court, *sua sponte*, that the Opinion concurring in part and dissenting in part filed by Circuit Judge Buckley be, and hereby is amended, as follows:

Page 1, line 21, omit "("APA") section 10(a)"

Page 1, line 26, change "10(a)" to "701(a)"

Page 1, line 30, change "10(a)(1)" to "701(a)(1)"

Page 1, line 33, change "10(a)(2)" to "701(a)(2)"

Page 9, line 5, change "10(a)(1)" to "701(a)(1)"

Page 11, line 30, change "10(a)(2)" to "701(a)(2)"

Page 12, line 4, change "10(a)(2)" to "701(a)(2)"

Page 13, line 13, change "10(a)(2)" to "701(a)(2)"

Page 13, line 23, change "10(a)(2)" to "701 (a)(2)"

Page 13, line 25, change "10(a)(2)" to "701 (a)(2)"

Page 13, line 31, change "10(a)(2)" to "701 (a)(2)"

Page 14, line 2, change "10(a)(2)" to "701 (a)(2)"

Page 14, line 6, change "10(a)(2)" to "701 (a)(2)"

Page 14, line 21, change "10(a)(2)" to "701 (a)(2)"

Page 15, note line 4, change "10(a)(2)" to "701(a)(2)"

Page 15, note line 18, change "10(a)(2)" to "701(a)(2)"

Page 16, line 2, change "10(a)(2)" to "701 (a)(2)"

Page 17, line 12, change "10(a)(2)" to "701 (a)(2)"

Page 18, line 31, change "10(a)(1)" to "701 (a)(1)"

Page 18, line 31, change "10(a)(2)" to "701 (a)(2)"

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2016

JOHN DOE, PLAINTIFF

v.

WILLIAM CASEY, DEFENDANT

[Filed Jan. 16, 1985]

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

The plaintiff John Doe claims that after nine years of service with the Central Intelligence Agency ("CIA" or "Agency") his employment was unlawfully terminated because he voluntarily acknowledged to his superior that he had engaged in homosexual practices. Following that disclosure, the CIA Director, William Casey, decided that it was "necessary and advisable in the interests of the United States to terminate [Doe's] employment . . . pursuant to section 102(c) of the National Security Act of 1947 [50 U.S.C. § 401]. . ." [1]

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[1] Letter dated May 11, 1982 from CIA Deputy General Counsel, Ernest Mayerfeld, to Mark H. Lynch, Esq. Plaintiff's Motion for Summary Judgment, Ex. B.

John Doe asserts that the Director provided no reasons for his decision, thus, rendering him unable to respond to the charges. In his complaint seeking declaratory and injunctive relief, plaintiff alleges that he was deprived of the elements of fundamental fairness, that he was the victim of procedural deficiencies and irregularities arising from the refusal of the Director to supply reasons for his dismissal and a reasonable and fair opportunity to respond to those reasons. He charges that in dismissing him, the Director violated Agency regulations and provisions of both the National Security Act and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. He further charges that the Director violated his Fifth Amendment due process and equal protection rights, his liberty interest, as well as his right to privacy under the First, Fourth, Fifth and Ninth Amendments of the Constitution. The CIA Director is sued in his official capacity.

Plaintiff seeks a judicial declaration that Director Casey abused his discretion, acted arbitrarily and improperly, and violated his rights secured by the Constitution. Injunctive relief, requiring the Director either to reinstate him to his former position, or alternatively, to provide him with a statement of reasons for termination of his employment, and an adequate opportunity to respond to those reasons is also sought.[2]

At the outset, the defendant moved to dismiss Doe's complaint asserting insufficiency of service of process, improper venue, lack of subject matter jurisdiction, and failure to state a claim upon which

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[2] In an amended complaint, filed November 4, 1982 the plaintiff restricted his claim to declaratory and injunctive relief, omitting any claim for monetary relief and back pay.

relief can be granted. The parties also filed cross motions for summary judgment.

The legal memoranda submitted by counsel were exhaustive, ably presented, and have been fully considered. For the reasons set forth below, the Court determines that this proceeding should not be dismissed and that the decision of the CIA Director to terminate the plaintiff's employment was improper, unreasonable, an abuse of discretion and both procedurally and substantively flawed. The Court also determines that under the circumstances the plaintiff is entitled to declaratory and limited injunctive relief. The proceeding should be remanded to the Agency for further consideration consistent with the conclusions set out in this Memorandum Opinion and the accompanying Order.

BACKGROUND

The affidavits and statement of material facts presented in the plaintiff's motion for summary judgment stand unchallenged by the Government. They are briefly recounted.

In June 1973, at the age of 17, John Doe began employment with the CIA as a clerk typist. Four years later he was promoted to an electronics technician position, and, in 1978, he was selected for participation in the Agency's upward mobility program. By that time, he had acquired a non-probationary employee status. Throughout his employment he received acceptable performance ratings and there was no dissatisfaction with his work reported by any supervisor.

Doe became aware of his homosexuality in 1976 and his orientation was known to his family and immediate friends. His homosexuality was never publi-

cized and he never made advances toward fellow employees. During the course of his employment there was no indications that, at any time, he disclosed classified information to unauthorized persons, that he ever engaged in any conduct with any one individual which compromised security with foreign nationals or anyone else, or that his homosexuality disrupted or affected his duties and responsibilities in any manner.

By January 1982, plaintiff voluntarily informed a security officer of his homosexuality. He was then told that he was in violation of CIA regulations; and on February 2, 1982, he was placed on administrative leave. Plaintiff was interviewed extensively about his homosexuality and his risk to security. Later, a polygraph test was administered covering that matter. Doe was advised that his responses to questions on that test were truthful. An Adjudication Report on his case was prepared by the Office of Security and then forwarded to Director William Casey. The Deputy General Counsel of the CIA informed Doe's counsel that homosexuality was not a *per se* ground for dismissal but that it was a security concern which would be evaluated on a case-by-case basis.

On April 14, 1982, a security officer informed Doe that the Office of Security had determined that the "circumstances of his homosexuality" posed a security threat. Plaintiff sought an explanation of the reasons why the "circumstances" posed such a threat; but his request was denied and no further explanation was provided. Doe was asked to resign and he declined to do so. Later, his counsel also sought a statement of the reasons why the determination was made that Doe's homosexuality posed a security threat.

On May 11, 1982, the Deputy General Counsel wrote to plaintiff's counsel that Director Casey "deemed it necessary and advisable in the interests of the United States to terminate" Doe's employment, "pursuant to . . . the National Security Act . . . § 403(c)." No further explanation was given and Doe received no other statement of reasons. He was placed on administrative leave for the three months prior to his termination. He received full pay but was not required to report for duty.

The plaintiff also was notified that he was obliged to inform the CIA whenever he applied for a job requiring a security clearance, so that the prospective employer could be informed that the CIA had determined that he was a security threat due to his homosexuality. The May 11 letter, marked the termination of Doe's administrative leave status. All efforts of his counsel to secure both a statement of reasons and a copy of the Adjudication Report from the CIA were denied.

ANALYSIS

While several grounds for dismissal of the complaint are asserted, only two are considered meritorious and warrant consideration: improper venue and failure to state a claim upon which relief can be granted. Those problems will first be considered and followed by a discussion of the merits.

A.

Venue

The defendant argues that venue is improper in the District of Columbia and, therefore, that this proceeding should be dismissed or transferred to the Eastern District of Virginia where, it is claimed, the

CIA Director officially resides. The venue of a civil action involving federal question jurisdiction is governed by 28 U.S.C. § 1391(b); the venue of an action against an officer of the United States sued in his official capacity is governed by § 1391(e). Both sections provide that venue is proper in the judicial district where the defendant resides.

In advancing the improper venue argument, the government was confronted with somewhat of a dilemma because in three earlier proceedings before this District of Columbia District Court, the CIA explicitly and affirmatively admitted to the official residency of the CIA Director in the District of Columbia. Indeed, in those cases, no question or challenge of improper venue was presented in the government's pleadings. *McGehee* v. *Casey*, C.A. No. 81-0734 (D.D.C. 1981); *McGehee* v. *Turner*, C.A. No. 78-2407 (D.D.C. 1978); *Jordan* v. *Turner*, C.A. No. 78-2036 (D.D.C. 1978). When confronted with these inconsistencies, the Government's attempts to explain were strained and implausible.[3] Indeed, with respect to the two *McGehee* cases, the inconsistency could not be explained or defended at all. Defendant's Motion to Dismiss or Transfer on the Grounds of Improper Venue at 4, (Motion filed June 8, 1984).

Following argument and submission on the government's motion to dismiss and the cross motions for summary judgment, plaintiff's counsel was allowed to pursue discovery on the question of venue and the CIA Director's official presence in the District of Columbia. The results of that discovery clearly demon-

[3] Plaintiff's counsel does not urge that the government is collaterally estopped by its admissions but does urge that they are persuasive and convincing evidence to be considered along with the facts secured in subsequent discovery.

strated that Mr. Casey as the Director of Central Intelligence (DCI) performed a significant portion of his official duties in both the District of Columbia and the State of Virginia. The discovery focused on a 13-month period ending in March 1984. During that period, the DCI spent 226 days in the Washington, D.C. Metropolitan area. Of these, 190 were spent in both Virginia and the District, 32 were spent solely in Virginia and 4 solely in the District. Mr. Casey spent time in the District of Columbia in order to fulfill his DCI duties, his responsibilities imposed by statute and Executive Orders, and his duties connected with his position as a designated member of both the National Security Council and the President's Cabinet.

A review of the Director's statutory functions, permits a reasonable conclusion that he performs a significant amount of his official duties in the District of Columbia. The National Security Act of 1947, 50 U.S.C. § 401 *et seq.* created the CIA and the position of the Director of Central Intelligence. Section 402(a) of the Act establishes a National Security Council. The President, Vice President, Secretary of State and the Secretary of Defense are members of the Council. Section 403(a) provides that "there is established under the National Security Council a Central Intelligence Agency with a Director . . . who shall be the head thereof . . . ." The duties of the Agency and the DCI, set out in section 403(d), establish the CIA as an instrument of the National Security Council. That section together with section 1.5 of Executive Order 12333, 3 C.F.R. 200 (1982), provide that the DCI advise the President and the National Security Council on intelligence matters and coordinate intelligence activities of other gov-

ernment agencies. Further, pursuant to 50 U.S.C. § 413, the DCI is required to keep the congressional intelligence committees fully and currently informed on all intelligence matters. Since 1981, Director Casey has also served as a member of the President's Cabinet.

As a Cabinet officer, advising both the President and the National Security Council, and as an advisor to intelligence committees of the Congress, the DCI resides in the District where both the Cabinet, the Council, and the Congress sit. While the physical facilities of the CIA are located in Virginia, Director Casey's duties in the District are such that he maintains offices at two locations in the District, at the Old Executive Office Building and at the Intelligence Community Headquarters Building.

It is not unusual for public officials to have more than one designated place of official residence. When a public agency undertakes much of its business in a district different from that in which the agency is headquartered, venue is proper in the former district. *Florida Nursing Home Ass'n* v. *Page*, 616 F.2d 1355, 1360 (5th Cir.), *cert. denied*, 449 U.S. 872 (1980), *rev'd on other grounds*, 450 U.S. 147 (1981) *reh'g denied*, 451 U.S. 933 (1981); *Lamont* v. *Haig*, 590 F.2d 1124, 1128 n.19 (D.C. Cir. 1978) (drawing a distinction between the residence where official duties are performed and the personal residence of the defendant).

In determining the residence of a public official sued in his official capacity, the test of residence is where official duties are performed. When, as here, Director Casey performs a substantial portion of his duties in the District, although a larger proportion in Virginia, it is appropriate to conclude that the District of Columbia is a proper place for venue. In *Buffalo Teachers Federation, Inc.* v. *Helsby*, 426 F. Supp. 828, 830 (S.D.N.Y. 1976), venue was held proper in a district where a state agency conducted a substantial portion of its business even though the headquarters' location was in a different district.

Failure to State a Claim

Various grounds are advanced to support the government's argument that Doe's complaint fails to state a claim upon which relief can be granted. The two considered most important are: that because Doe seeks an award of damages the doctrine of sovereign immunity precludes the claim, and; that assuming the Government has consented to be sued by virtue of of the Administrative Procedure Act, review of the Director's dismissal action is foreclosed by section 701(a)(1)(2); that the CIA Director is empowered by statute, 50 U.S.C. § 403(c), with unreviewable authority to terminate an employee and that the decision is committed by law to agency discretion.

The argument that sovereign immunity bars the plaintiff's claim is flawed and misplaced. In 1976, the APA was amended, and the "Right of review" provision, 5 U.S.C. § 702, authorized non-monetary relief against a federal agency or officer. The section provides in relevant part

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages

> and stating a claim that an agency or an officer . . . thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief . . . denied on the ground that it is against the United States . . . .

In this proceeding the plaintiff does not pursue a monetary claim, but rather, Doe requests declaratory and injunctive relief, specifically, a judicial declaration that Director Casey abused his discretion in dismissing him and a determination that the Director violated his procedural rights. The plaintiff also seeks either reinstatement or, alternatively, a statement of reasons for his dismissal and a full opportunity to respond to those reasons. He relies upon 28 U.S.C. § 1361 which grants relief in the nature of mandamus to compel a federal officer to perform a duty owed to a plaintiff. When read together, section 702 of the APA and section 1361 of Title 28 may be considered as statutory waivers of sovereign immunity. At this point in time, it can scarcely be contended that when a government official is charged with superseding his or her authority the doctrine of sovereign immunity may be invoked.

But more importantly, the argument that the doctrine of sovereign immunity bars the plaintiff's efforts has been undermined and discredited by two recent decisions of our Circuit Court, *Clark* v. *Library of Congress*, No. 83-1510 (D.C. Cir. Dec. 11, 1984) and *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984), *rehearing en banc denied*, 746 F.2d 1579 (D.C. Cir. 1984). In *Clark*, the plaintiff sued the Library of Congress, his former employer, seeking reinstatement as an employee, and an injunction prohibiting any further investigation of his political beliefs and associations which led to his leaving the

Library. He charged the Library with violations of his First Amendment rights. He also sought compensatory and punitive damages. The Court of Appeals held that while sovereign immunity barred any relief for damages it was no obstacle to a claim for reinstatement, correction of his personnel records and an injunction against infringement of constitutional rights. The matter was reversed and remanded to the district court for consideration on the plaintiff's claims for specific non-monetary relief. *Dronenburg* involved a naval petty officer's challenge to his administrative discharge for homosexual conduct and a claim that his constitutional rights to privacy and equal protection of laws had been violated. The Navy raised threshold questions—lack of subject matter jurisdiction and sovereign immunity, contending that plaintiff's complaint was essentially one for damages that should be pursued in the Court of Claims under the Tucker Act and, therefore, that the District Court lacked jurisdiction.

In rejecting the government's argument, the Circuit Court noted that "5 U.S.C. § 702 was intended to waive the sovereign immunity of the United States in suits for injunctive relief," 741 F.2d at 1390. "We are further bound by another decision of this court holding that 'the United States and its officers . . . are [not] insulated from suit for injunctive relief by the doctrine of sovereign immunity.' *Schnapper* v. *Foley*, 667 F.2d 102, 107 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982)." *Id.* In discussing the legislative history of section 702, the *Schnapper* court noted

> The legislative history of this provision could not be more lucid. It states that this language was intended 'to eliminate the defense of sover-

> eign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful official action by a federal official . . . .' S. Rep. No. 996, 94th Cong., 2d Sess. at 2 (1976).

Schnapper, 667 F.2d at 108.

B.

In reviewing Director Casey's actions, the basic inquiry is whether the plaintiff was afforded procedural due process—namely: was he given adequate notice of the agency action, was he informed of the rationale of the agency's final decision or at least a statement of reasons; was he given an opportunity to respond or to comment or was he given a hearing where he could address the agency's rationale and present his position and defenses? *See Nat'l Ass'n of Recycling Industries* v. *Interstate Commerce Commission*, 627 F.2d 1328, 1334 (D.C. Cir. 1980) *vacated in part*, *Consolidated Rail Corp.* v. *Nat'l Ass'n of Recycling Industries, Inc.*, 449 U.S. 609 (1981). The answers to these questions as reflected in the record show that plaintiff Doe was not afforded such opportunities and indeed, at no time was there a recognition of such rights.

In failing to observe even the most minimal due process procedures, the CIA failed to acknowledge and follow its own regulations. When Doe was terminated in May 1982, he was a non-probationary career employee. By virtue of that status he was entitled to various procedural safeguards before the agency made a final decision to terminate his employment.

At the time, a controlling document—Headquarters Regulation—was in effect within the CIA. Section HR 27 of the Regulation entitled "Separation By The Agency," spelled out the procedure to be followed when termination of a non-probationary employee was involved. Sections HR 27b-i dealt with eight grounds for involuntary separation. None of these grounds related to an employee's sexual activities. Section HR 27e provided for termination of an employee because of failure to meet standards of conduct. But no regulation established a standard relating to sexual conduct or matters. The matters covered related only to conflict of interest, acceptance of gifts and decorations, and participation in riots and civil disturbances.

While 27m [4] permitted exceptions when the procedures were "impractical or undesirable" and when the DCI "considers it necessary or advisable in the interests of the United States," subsequent sections provide that an employee be given reasons for the proposed actions and an opportunity to respond orally or in writing, HR 27m(2), and an opportunity for

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[4] The language of HR 27m tracks almost verbatim the provisions of 50 U.S.C. 403(c). That statutory provision provides that the Director "may, in his discretion, terminate the employment of any . . . employee . . . whenever he shall deem such termination necessary or advisable in the interests of the United States. . . ."

While section 27m provides that an employee "may be separated immediately and without regard to any suggested procedural steps when the Director . . . considers it necessary or advisable in the interest of the United States" the immediacy and urgency of Doe's employment status is belied by the fact that his voluntary disclosures were made in January 1982, but it was not until five months later—May 1982, that the Director decided to fire him.

final appeal to the Director, HR27m(4). The plaintiff contends that he was not afforded any of the benefits or safeguards conferred by the Headquarters Regulation.

When a government agency promulgates and establishes regulations conferring procedural due process rights on its employees, it must adhere to its promulgated rules to avoid any injustice even though they may not be statutory or constitutional requirements. *Bartholomew* v. *United States*, 740 F.2d 526 (7th Cir. 1984); *Mazaleski* v. *Treusdell*, 562 F.2d 701, 719 (D.C. Cir. 1977); *Doe* v. *Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977). Those appellate rulings adhere to long-recognized Supreme Court precedents. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957). "An executive agency must be rigorously held to the standards by which it professes its actions to be judged. Accordingly, if dismissal from employment is based on a defined procedure . . . that procedure must be scrupulously observed." *Vitarelli*, 359 U.S. at 546 (Frankfurter, J., concurring in part and dissenting in part).

Moreover, within the context of the specific facts presented in this proceeding—concerned with homosexuality and federal employment, rulings from this Circuit support Doe's claim that he was entitled to invoke and rely upon the procedures prescribed by the CIA Headquarters Regulations. On more than one occasion our Appeals Court has ruled that when a federal employee is dismissed for reasons associated with homosexuality he is entitled to fair treatment and should be afforded all available and prescribed procedural safeguards. *Ashton* v. *Civiletti*, 613 F.2d 923, (D.C. Cir. 1979); *Matlovich* v. *Secy. of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978); *Norton* v. *Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

The facts in *Matlovich* were not remarkably different than those which plaintiff Doe confronted. An Air Force serviceman, after 12 years of service, acknowledged his homosexual preferences to his superiors. Air Force regulations permitted exceptions to the general policy of discharging homosexuals and, in fact, such individuals had been retained in the past. In discharging Matlovich, the Air Force provided no statement of reasons why the exception was not invoked.

Because the Air Force Secretary failed to supply reasons and further explanations, his actions were determined to be unlawful, arbitrary and capricious. In reversing the district court and remanding the matter to the Air Force for proper consideration, the Appeals Court ruled "the absence of any reasoned explanation in this particular case—makes it impossible to decide whether or not there has been an abuse of discretion in this instance or whether improper factors have played a material role," 591 F.2d at 856. At a further point, the Court was even more explicit:

> The normal rule where a discretionary administrative decision is to be reviewed by a court (other than on a *de novo* basis) is that the agency must give sufficient indication of the grounds for its exercise of discretion that the reviewing tribunal can appraise that determination under the appropriate standards of review (and the applicant for relief can challenge it). This basis concept has been reiterated time and again—in differing formulations and contexts *but always centering on the need for the court, and the complaining party, to be given some helpful insight into the agency's reasoning.*

> *The fundamental principle of reasoned explanation embodied* in these (and comparable) decisions serves at least three interrelated purposes: enabling the court to give proper review to the administrative determination; helping to keep the administrative agency within proper authority and discretion, as well as helping to avoid and prevent arbitrary, discriminatory, and irrational action by the agency; and informing the aggrieved person of the grounds of the administrative action so that he can plan his course of action (including the seeking of judicial review).

Id. at 857 (emphasis added; citations omitted). But aside from the problem of homosexuality presented in this proceeding, our Court of Appeals has consistently recognized that while deference should be afforded to an agency's interpretation and implementation of its regulations, it nonetheless must supply adequate reasons for its decisions. *Moon* v. *United States Department of Labor*, 727 F.2d 1315 (1984). "[A]n agency must provide a reasoned explanation for its actions and articulate with some clarity the standards that govern[] its decisions." *Id.* at 1318, citing *Matlovich*, 591 F.2d 856-61.

1.

In justifying his actions the Director relies principally upon section 403(c) of the National Security Act. The section authorizes termination of a CIA employee and provide in pertinent part:

> Notwithstanding the provisions of [Section 652 of Title 5], or the provisions of any other law, the [DCI] may, in his discretion, terminate the employment of any officer or employee . . .

> whenever he shall deem such termination necessary or advisable in the interests of the United States.

50 U.S.C. § 403(c).

A review and analysis of this provision presents troublesome and unresolved questions of statutory review. Counsel for the CIA argues with assurance that the plain language of the statute establishes that the decision to terminate an employee is committed to the uncontrolled discretion of the DCI and that in the absence of any statutory limitation, his exercise of discretion is unlimited and intended by the Congress to be unreviewable. He further contends that there is no procedural requirement that Doe be supplied with a statement of reasons explaining his termination because neither section 403(c) of the National Security Act nor section 27m of the Headquarters Regulation require the DCI to give such a statement. To support these arguments, the CIA's counsel relies confidently upon several Circuit and Court of Claims decisions which subscribe and adhere to the exact language of the statute. *Torpats* v. *McCone*, 300 F.2d 914, 915 (D.C. Cir. 1966), *cert. denied*, 371 U.S. 886 (1962) [*sic*]; *Baker* v. *United States*, 224 Ct. Cl. 760, 761-62 (Ct. Cl. 1980), *cert. denied*, 450 U.S. 1040 (1981); *Rhodes* v. *United States*, 156 Ct. Cl. 31, 37 *cert. denied*, 371 U.S. 821 (1962); *see also Kochan* v. *CIA*, C.A. No. 2728-58 (D.D.C. May 20, 1958).

However, it has long been established that language conferring such discretion does not in and of itself preclude preview. And even if the argument is accepted that the DCI has broad discretion under section 403(c), judicial review cannot be denied where there is a claim that discretion has been abused. Sec-

tion 706(2)(A) of the APA, was intended to and unmistakably provides for such review when agency action is excessive. In the language of the statute, judicial review is appropriate when action has been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Moreover, it should be noted that section 701(a)(2) of the APA, upon which the government relies, has been narrowly interpreted by the courts as well as by authoritative commentaries.[5] *Citizens to Preserve Overton Park* v. *Collins*, 397 U.S. 159, 166 (1970); *U.S. Lines, Inc.* v. *Federal Maritime Commission*, 584 F.2d 519 525 (D.C. Cir. 1978); *Adams* v. *Richardson*, 480 F.2d 1159, 1161-62 (D.C. Cir. 1973); B. Schwartz, *Administrative Law* at 610-11 (1976); W.C. Davis, *Administrative Law of the Seventies* § 28.19 (Supp. 1980).

Finally, section 403(c) of the Act says nothing about judicial review nor does its language suggest in any way that courts are ousted from reviewing agency action. To determine whether a statute precludes judicial review, courts are bound to recognize that the APA affords a "basic presumption of judicial review" that "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). The Supreme Court addressed this subject during its last term in *Block* v. *Community Nutrition Institute*, 52 U.S.L.W. 4697 (June 4, 1984), and held that "specific language or specific legislative history," "contemporaneous judicial construction barring review and congressional

[5] Section 701(a)(2) provides for an exception to the extent that "agency action is committed to agency discretion by law."

acquiescence in it," "the collective import of legislative and judicial history behind a particular statute" or "inferences of intent drawn from the statutory scheme as a whole" may overcome the presumption of reviewability. 52 U.S.L.W. at 4699. None of these factors are present with respect to section 403(c). In the absence of such, the DCI's exercise of discretion must be set aside as arbitrary, capricious, and as a denial of procedural due process.

CONCLUSION

The Court is not unmindful of the position occupied by and the role played by the CIA in accomplishing its statutory mission. The Court is also aware that because of the facts and sensitive nature of some Agency personnel decisions, they should be shielded from full public scrutiny. But the record at this point does not reflect or even suggest that overriding national security concerns are at stake or that affording the plaintiff Doe the relief he seeks, might disclose matters that would place at risk such concerns and interests. In sum, the state of this record does not support the government's position that the DCI should have carte blanche authority and limitless discretion, free of judicial review.

This opinion does not address the several constitutional claims pressed by the plaintiff. Those claims present difficult and unsettled issues of law, made even more uncertain by shifting views of appellate tribunals. Because of the stated reasons and bases upon which it is determined that relief should be granted to the plaintiff on other grounds, the Court foregoes at this time a discussion and review of his constitutional claims.

The plaintiff is entitled to his procedural due process rights as provided by the Agency's regulations, statutory authority and judicial precedent. Pending the granting of such rights he should be reinstated to the administrative leave status that he held before he was terminated by the DCI, *supra*, p. 5.

Entered: January 15, 1985

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

Civil Action No. 82-02016

No. 85-5291

JOHN DOE

v.

WILLIAM J. CASEY, DIRECTOR, C.I.A., APPELLANT

Appeal from the United States District Court
for the District of Columbia

[Filed Aug. 1, 1986]

Before: EDWARDS, GINSBURG and BUCKLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed herein is reversed, and this case is remanded for further proceedings consistent with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 1, 1986

Opinion for the Court filed by Edwards, Circuit Judge.

Concurring opinion filed by Ginsburg, Circuit Judge.

Opinion concurring in part and dissenting in part filed by Buckley, Circuit Judge.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

Civil Action No. 82-02016

No. 85-5291

JOHN DOE

v.

WILLIAM J. CASEY

[Filed Oct. 9, 1986]

Before: EDWARDS, GINSBURG and BUCKLEY, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing, filed September 15, 1986, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Buckley would grant the petition for rehearing.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986
Civil Action No. 82-02016

No. 85-5291

JOHN DOE

v.

WILLIAM J. CASEY

[Filed Oct. 9, 1986]

Before: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY and WILLIAMS, Circuit Judges

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the members of this Court in regular active service have not voted in favor of rehearing *en banc*. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellant's suggestion for rehearing *en banc* is denied.

Per Curiam

BY THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judges Bork, Starr, Silberman, Buckley and Williams voted in favor of rehearing *en banc*.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2016

JOHN DOE, PLAINTIFF

v.

WILLIAM CASEY, APPELLANT

[Filed Jan. 16, 1985]

ORDER AND JUDGMENT

On basis of the Court's Memorandum Opinion filed on this date, it is

ORDERED

That the motions of the Central Intelligence Agency to dismiss the plaintiff's complaint and for summary judgment are denied;

That the plaintiff's motion for summary judgment is granted on the grounds that he was denied and deprived of procedural due process rights, and judgment is entered for the plaintiff;

That the plaintiff shall be afforded all procedural due process rights as provided in the Court's Memorandum Opinion of this date;

That the Director of the Central Intelligence Agency is enjoined to reinstate the plaintiff Doe,

within 30 days from the date of this order, to the administrative leave status formerly occupied by plaintiff, until such time he is granted procedural due process.

Entered: January 15, 1985

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40194

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
APR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1294

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE,
Petitioner,

v.

JOHN DOE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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April 8, 1987

QUESTION PRESENTED

Whether section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), precludes judicial review of a claim that the decision of the Director of Central Intelligence to fire a CIA employee violated the employee's constitutional rights.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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ROBERT M. GATES,
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Petitioner,

v.

JOHN DOE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

To understand why review by this Court is unnecessary and inappropriate, it is important to focus on precisely what the court of appeals ruled, for the petition rests on an inaccurate statement of the posture of the case. Although the court held that the firing decisions of the Director of Central Intelligence (DCI) may be reviewed under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* (App. 7a-19a), the court also held that the APA does not in the circumstances of this case entitle Doe to a statement of reasons for his termination. (App. 25a-26a.)[1]

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[1] The court of appeals also held that the CIA's regulations provide no independent source of procedural or substantive protection for respondent. (App. 19a-23a.) In addition, the court held that to the extent Doe's liberty interest in his reputation was burdened by

Having rejected Doe's claim to relief under the APA, the court remanded for further proceedings on two limited issues, one of fact and one of law, relevant to Doe's contention that the firing violated his constitutional rights. Since the record is unclear whether the CIA's policy bars employment just because someone is a homosexual or only because of homosexual conduct, the court of appeals directed the district court to make this factual determination. (App. 27a.) The court ruled that if the Agency's employment policy is based on homosexual conduct, Doe's claim of constitutional violation would be barred by the decision in *Bowers* v. *Hardwick*, 106 S. Ct. 2841 (1986). However, the court said that if the CIA's policy is based on mere homosexual orientation, "there is an *arguable* claim that can be litigated." (App. 27a, emphasis in original.) Thus, the only claim left to be litigated in this case is a potential, but by no means clear, constitutional claim that could be litigated even if the Administrative Procedure Act had never been enacted.

ARGUMENT

I. THIS CASE IS NOT IN AN APPROPRIATE POSTURE FOR REVIEW BY THIS COURT

Petitioner contends that the question presented by this case is whether the decision of the Director of Central Intelligence to fire a CIA employee is judicially reviewable under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* As we have just seen, this is not an accurate statement of the case in its present posture. Although the court of appeals held that the DCI's firing decisions are judicially reviewable under the APA, that holding was unnecessary to its ultimate decision. The only issues left open under the opinion of the court of appeals are: (1) whether the CIA has a policy of deny-

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the DCI's determination that Doe's homosexuality presented a security risk, Doe received all the process to which he was due in clearing his name. (App. 31a-32a.)

ing employment on the basis of homosexual orientation rather than conduct, and (2) if so, whether this policy violated respondent's constitutional rights. (App. 27a.)

Since all that is left of Doe's case is a potential constitutional claim, it makes no difference to his case whether the decisions of the DCI are reviewable under the Administrative Procedure Act. When a party states a constitutional claim, federal courts have subject matter jurisdiction under 28 U.S.C. § 1331, even if no specific statute authorizes review. *Davis* v. *Passman*, 442 U.S. 228, 234-44 (1979). Thus the question presented by petitioner concerning the availability of review under the APA is merely an academic one, irrelevant to the issues remaining to be litigated by the parties. Since the issue does not arise "in the context of meaningful litigation," its resolution "can await a day when the issue is posed less abstractly." *The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

The real issue presented by this case in its present posture is whether section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), precludes judicial review of a constitutional claim. Although not articulated in petitioner's question presented, this issue is discussed at pages 22-25 of the petition. There petitioner argues that the Court should address the questions whether Congress can foreclose review of constitutional claims and whether section 102(c) is a statute that forecloses such review. There are two reasons why this case is not an appropriate vehicle for the Court's consideration of these issues.

First, these issues were not litigated below. As the court of appeals pointed out, "government counsel conceded at oral argument that the agency was not prepared to say that constitutional claims, or even claims that the Director acted in excess of his or her statutory authority, are precluded from review." (App. 17a.) This

statement at argument was entirely consistent with the government's briefing of the case, both in the district court and the court of appeals. Now, before this Court the government argues for the first time in this litigation that section 102(a) immunizes the DCI from judicial review even if his firing decisions violate constitutional norms—if, for example, he chooses to "terminate Black employees simply because they are Black, female employees simply because they are female, or even blonde employees simply because they are blonde." (App. 16a.)

The assertion that Congress intended a statute to preclude review of constitutional claims is "an extreme position," *Bowen* v. *Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2141 (1986), presenting a "serious constitutional question." *Id.* at 2141 n.12. An issue of this magnitude should not be addressed for the first time in this Court without having been raised and considered in the courts below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).[2]

Second, consideration by this Court of the question whether section 102(c) precludes judicial review of constitutional claims is premature, because it is not at all clear that any constitutional claim requiring review will remain after the proceedings on remand. As the court of

[2] Moreover, petitioner's contention that section 102(c) bars review of constitutional claims is wholly without merit. Before adopting a construction of a statute that would force resolution of Congress' power to foreclose review of constitutional claims, this Court has said that it would require "a showing of 'clear and convincing evidence'" that Congress intended such a construction. *Bowen* v. *Michigan Academy of Family Physicians*, 106 S. Ct. at 2141. The court of appeals demonstrated that petitioner failed to marshal any evidence to overcome the presumption of reviewability under the APA. (App. 9a-14a.) Even more clearly, petitioner has failed to marshal any evidence—much less clear and convincing evidence—that Congress intended section 102(c) to preclude judicial review of constitutional claims.

appeals pointed out, the record is not clear whether the CIA has a policy of discharging homosexuals because they are homosexual or only if they engage in homosexual conduct. (App. 27a.) The court further ruled that if the policy is based on conduct, respondent's claim to constitutional protection is foreclosed by the decision in *Bowers* v. *Hardwick*, 106 S. Ct. 2841 (1986). (App. 27a.) Thus, after further development of the facts, the district court may resolve this case in such a way as to make the issue pressed on this Court by petitioner—which is not the issue stated in the question presented—disappear.

II. PETITIONER HAS EXAGGERATED THE IMPORTANCE OF THE DECISION BELOW

Petitioner argues that "[t]his case presents a question of exceptional public importance regarding the ability of the Director of Central Intelligence to maintain the confidentiality of the Agency's personnel policies and actions." (Petition at 10). This theme is played over and over again throughout the petition, as the government asserts that national security secrets will be put at risk by the decision below. This simply is not so.

This case has been litigated without any contest over what information is secret. With the exception of respondent's name, the CIA has never asserted that any part of the record is classified or otherwise requires confidential treatment. Although the Agency has refused to disclose its reasons for determining that the circumstances of respondent's homosexuality present a security risk, it has not asserted that disclosure of these reasons would harm the national security.

If any sensitive information were implicated in this or a similar case, the DCI has ample authority to protect the secrecy of that information. First, the Director can invoke the state secrets privilege. *See United States* v. *Reynolds*, 345 U.S. 1 (1953). This privilege has proven to be an effective and reliable shield when civil

litigation threatens the disclosure of information that government officials believe must be kept secret in the interests of national security. *E.g.*, *Salisbury* v. *United States*, 690 F.2d 966 (D.C. Cir. 1982); *Halkin* v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978). Indeed, complaints that adverse personnel actions are unconstitutional have been dismissed when the government could not, for reasons of security, disclose the reasons for its actions. *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984). In addition to the state secrets privilege, the DCI also has available statutory privileges to protect information relating to intelligence sources and methods, 50 U.S.C. § 403(d)(3), and "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 403g.

The Director's assertion of these common law and statutory privileges is accorded "great deference" by the courts. *CIA* v. *Sims*, 471 U.S. 159, 179 (1985). *See Halkin* v. *Helms*, 598 F.2d at 9. We know of no case where the CIA has been required by a final order to reveal information against its will. Armed with these privileges, the DCI will encounter no difficulty in protecting any sensitive information involved in a firing decision that is challenged in court. Contrary to petitioner's exaggerated submissions, the mere availability of the limited judicial review permitted by the court of appeals will not compromise the Agency's secrets.

Furthermore, petitioner has neglected to inform the Court of an important fact that undermines his assertion that judicial review of his firing decisions presents an intolerable threat to the national security. The CIA, like any other government agency, is amenable to suits for employment discrimination on the basis of race or sex under Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 42 U.S.C. § 2000e-16. Under this statute, the Agency is regularly required to defend its personnel practices and

decisions in court. *E.g.*, *Brown* v. *Turner*, 490 F. Supp. 939 (D.D.C. 1980), *aff'd*, 659 F.2d 1199 (D.C. Cir. 1981); *Turbeville* v. *Casey*, 525 F. Supp. 1070 (D.D.C. 1981); *Weber* v. *Turner*, 92 F.R.D. 749 (D.D.C. 1981); *Neely* v. *CIA*, 27 Fair Empl. Prac. Cas. (BNA) 82 (D.D.C. 1981).

Title VII suits against the CIA typically involve litigation over "issues of hiring, promotions, specialized training, overseas assignments, management opportunities, career advancement, bias in evaluations of performance and allegedly sexist and discriminatory attitudes of supervisors." *Turbeville* v. *Casey*, 525 F. Supp. at 1071. Thus, the decision below does not expose the CIA to any qualitatively different litigation than it already faces under Title VII. Since Congress has decided that the burdens imposed by Title VII suits do not present an undue threat to the national security, the decision below does not present any additional dangers that warrant this Court's review.

III. THERE IS NO CONFLICT BETWEEN THE LOWER COURTS ON THE ISSUE PRESENTED

Petitioner asserts that the opinion of the court of appeals is inconsistent with the opinion of the Court of Claims in *Baker* v. *United States*, 224 Ct. Cl. 760 (1980), *cert. denied*, 450 U.S. 1040 (1981). (Petition at 27.) However, as petitioner concedes (*id.* at 27 n.26), *Baker* did not present any constitutional claim. Thus, there is no conflict between that case and the only holding of this case that has practical significance.

Petitioner also asserts that the opinion below cannot be reconciled with other opinions of the District of Columbia Circuit. (Petition at 25.) But these allegedly conflicting opinions, like that of the Court of Claims in *Baker*, did not involve constitutional claims. Moreover, the question of intracircuit harmony is best left to the circuit itself

and does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).[3]

IV. THE DECISION BELOW IS CORRECT

For the reasons set forth above, the ruling of the court of appeals that the DCI's firing decisions are judicially reviewable under the APA has no practical significance under the terms of the court's remand. Accordingly, the correctness or incorrectness of that ruling should be even less important to disposition of the petition for certiorari than is usually the case. Nonetheless, it is clear that the court of appeals correctly ruled that section 102(c) of the National Security Act of 1947 does not either preclude judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(1), or commit agency action solely to the agency's discretion, 5 U.S.C. § 701(a)(2).

A. Preclusion By Statute

In order to demonstrate that section 102(c) precludes judicial review, petitioner bears "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision[s]." *Bowen* v. *Michigan Academy of Family Physicians*, 106 S. Ct. at 2136, quoting *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). The court of appeals was plainly correct in ruling that petitioner failed to carry this burden.

There are three sources of evidence that Congress intended a particular statute to preclude judicial review—the statute itself, the legislative history, and the structure of the statutory scheme. *Bowen* v. *Michigan Academy of Family Physicians*, 106 S. Ct. at 2137. None of these

[3] Although the District of Columbia Circuit divided five to five on petitioner's suggestion for rehearing *en banc*, the court at that time was two judges short of its full statutory complement. *See* 28 U.S.C. § 44. Thus there is no reason to believe that the court of appeals will be unable to resolve any purported conflict in its own decisions if concrete circumstances require such action.

sources provides sufficient evidence to overcome the heavy presumption in favor of judicial review of the DCI's firing decisions.

First, the statute itself contains no language barring review. Section 102(c) provides in pertinent part that "[n]otwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . ." 50 U.S.C. § 403(c). Neither the "notwithstanding" clause nor the operative clause says anything about judicial reviewability; they both deal solely with what happens at the agency level. By contrast, the statutes cited by petitioner (Petition at 18-19 nn.16 and 17) dealing with employment at the Defense Intelligence Agency and the National Security Agency show that Congress knows how to preclude judicial review explicitly when it wants to. 10 U.S.C. § 1604(e)(1); 50 U.S.C. § 833(a).

Second, petitioner concedes that the legislative history does not address the meaning of section 102(c). (Petition at 15.) Third, this Court has inferred congressional intent to preclude review only from statutory schemes that are "uniquely complex or otherwise delicately balanced." (App. 11a.) *See Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984). Since the National Security Act of 1947 is not such a statute, the court of appeals was correct in ruling that specific congressional intent to preclude judicial review is not fairly discernible from the detail of the legislative scheme. *Bowen* v. *Michigan Academy of Family Physicians*, 106 S. Ct. at 2137.

Petitioner's arguments that judicial review should be precluded because of the nature of the CIA's work are in fact nothing more than policy arguments presented by the DCI in support of his belief that he should have unreview-

able discretion to fire employees. These arguments, however, are no substitute for evidence of congressional intent, and petitioner makes no showing whatsoever that these arguments were either made by the executive branch or accepted by Congress at the time section 102(c) was enacted. Petitioner's arguments do not suffice to preclude review, for, as the court of appeals stated, the inquiry "is limited to what *Congress* intended, not what the CIA finds preferable." (App. 13a, emphasis in original.)

B. Committed To Agency Discretion

The court of appeals also was correct in its ruling that the DCI's firing decisions do not fall within the APA exception to judicial review for agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This provision is a "very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971), quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). Accordingly, section 701(a)(2) bars review only when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

Section 102(c) of the National Security Act of 1947, insofar as pertinent to the claim that it gives the DCI unreviewable discretion, states that the DCI "may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall determine such termination necessary or advisable in the interests of the United States . . . ." This statute plainly limits the Director's exercise of discretion to cases where termination is necessary or advisable in the interests of the United States. It therefore provides a standard against which courts can measure the exercise of discretion.

Petitioner's assertion that section 102(c) gives the DCI "absolute discretion to decide whether an employee should

be retained or dismissed" (Petition at 21) simply does not comport with the statute's language. Since the statute provides a standard by which to judge the exercise of discretion, there is law to apply, and section 102(c) does not fall within the very narrow exception created by 5 U.S.C. § 701(a)(2). *Heckler* v. *Chaney*, 470 U.S. at 830; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 410.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S.
FILED
APR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 86-1294

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT M. GATES,
ACTING DIRECTOR OF CENTRAL INTELLIGENCE,
PETITIONER

v.

JOHN DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

In this case, the court of appeals ruled that the decision of the Director of Central Intelligence to dismiss an officer or employee of the Central Intelligence Agency pursuant to the Director's authority under Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701-706. We argued in our petition in No. 86-1294 that the ruling below is inconsistent with the text, purposes, and structure of the statutes governing the CIA, that it will injure the Director's ability to safeguard the CIA's intelligence functions, and that it creates an anomaly in the overall scheme established by Congress to regulate access to classified information by employees in the intelligence community. Respondent's arguments that the decision below does not warrant review by this Court are entirely unpersuasive.

1. Respondent's primary argument (86-1294 Br. in Opp. 2-5) is that this case is not in an appropriate posture for review by this Court. Respondent asserts that the only issues left in this case are (1) whether he was discharged pursuant to a CIA policy refusing to employ homosexuals, and (2) if so, whether dismissing him for that reason was unconstitutional. Respondent argues that, since the district court has jurisdiction over his constitutional claim pursuant to 28 U.S.C. 1331, the court of appeals' holding that the Director's decision to remove him may be reviewed under the APA "was unnecessary to its ultimate decision" and is "merely an academic" matter (86-1294 Br. in Opp. 2, 3). That argument is unpersuasive.[1]

To begin with, respondent has misread the court of appeals' decision. Under the court of appeals' remand order, if the district court finds that respondent was dismissed pursuant to a CIA policy against employing homosexuals, the district court must determine whether that policy exceeds the Director's statutory authority, not simply whether such a policy is constitutional. See Pet. App. 27a ("At the very least, the CIA would have to justify why such a ban on the employment of homosexuals was 'necessary or advisable in the interests of the United States.'"). We doubt that respondent intends to waive his claim that the Director has exceeded his statutory authority.

In any event, respondent's claim lacks merit. Respondent sued the Director in his official, not his personal, capacity (see *Brandon* v. *Holt*, 469 U.S. 464 (1985)),

[1] Respondent's argument rests on the assumption that the district court can order him reinstated with the CIA simply by invoking 28 U.S.C. 1331, the general federal question jurisdiction provision. As we explained in the petition (at 12 n.9), neither the court of appeals nor the district court decided whether Section 1331 empowers a district court to order the CIA to reinstate respondent.

and respondent sought reinstatement, a form of relief that, by necessity, "operates against the United States" (*Dugan* v. *Rank*, 372 U.S. 609, 621 (1963); see also *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949); *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963) ("The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.")). Respondent therefore cannot obtain such relief unless the United States has waived its immunity from suit. The 1976 amendments to the APA generally waive sovereign immunity for an action, like respondent's, "seeking relief other than money damages" (5 U.S.C. (Supp. III) 702), but the waiver does not apply where, as with Section 102(c), Congress has foreclosed judicial review of the agency's action (5 U.S.C. 701(a)(1) and (2), 5 U.S.C. (Supp III) 702(1); H.R. Rep. 94-1656, 94th Cong., 2d Sess. 1-3 9-12, 19-20, 27 (1976); S. Rep. 94-996, 94th Cong., 2d Sess. 2, 9-12, 19, 25-26 (1976); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3659, at 358 (1985) (footnote omitted) ("there is no consent to waive immunity when a statute precludes judicial review, or when the injurious action is committed to agency discretion by law")).[2] Accordingly, even if respondent could have sought reinstatement under 28 U.S.C. 1331 on a so-called "officer's suit" theory (see *Larson* v. *Domestic & Foreign*

[2] "[I]t is * * * an important factor in [the Justice Department's] support for the bill that the waiver of immunity, since it is made via § 702, * * * will be subject to the other limitations of the Administrative Procedure Act, including that which renders review unavailable 'to the extent that—(1) statutes preclude judicial review, or, (2) agency action is committed to agency discretion by law.' 5 U.S.C. § 701(a). * * * These features were considered of great importance by the Administrative Conference Committee which originally drafted this legislative proposal, and they are important elements of the Department's support for the bill." H.R. Rep. 94-1656, *supra*, at 27 (quoting letter from Assistant Attorney General Scalia to Subcomm. Chairman Kennedy); S. Rep. 94-996, *supra*, at 26 (same).

Corp., *supra*) prior to 1976,[3] he cannot do so at this time. See *Block* v. *North Dakota*, 461 U.S. 273, 280-286 (1983) (Congress's adoption of a comprehensive scheme in the Quiet Title Act, 28 U.S.C. 2409a, to adjudicate title disputes involving real property in which the United States claims an interest forecloses "officers' suits"); *Brown* v. *GSA*, 425 U.S. 820 (1976) (Congress's adoption of a comprehensive scheme in § 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, to remedy federal employment discrimination forecloses other forms of judicial relief).[4]

[3] But see *Larson*, 337 U.S. at 691 n.11 ("[A] suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.").

[4] Respondent's reliance (86-1294 Br. in Opp. 3) on *Davis* v. *Passman*, 442 U.S. 228 (1979), is misplaced. *Davis* held that, in a suit against a government official in his personal capacity, a court may award a plaintiff damages for a violation of the equal protection component of the Fifth Amendment by relying upon 28 U.S.C. 1331. 442 U.S. at 245-248. *Davis* expressly left open the question whether a plaintiff could obtain reinstatement. *Id.* at 246 n.24. By contrast, in this case respondent sued the Director in his official capacity, and respondent sought reinstatement, rather than damages (see Pet. App. 60a n.2). *Davis* is therefore inapplicable.

Nor does the rationale of *Davis* apply here. Reinstatement, particularly with an intelligence agency, is not an historic remedy. See *White* v. *Berry*, 171 U.S. 366 (1898) (in the absence of an express statute, judicial review of a federal employee's dismissal is unavailable in an action for reinstatement). Moreover, Section 102(c) and the related statutes applicable to the other intelligence services (see Pet. 18-20), certainly qualify as "special concerns counseling hesitation" (*Davis*, 442 U.S. at 246) in the creation of such a remedy. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 538-542 (1985) (Stevens, J., concurring in the judgment) (provision in the federal wiretapping laws specifically exempting interceptions under President's authority for national security purposes should counsel some hesitation in creating a *Bivens* damages remedy against the Attorney General for ordering such a wiretap).

Finally, respondent argues (86-1294 Br. in Opp. 3-4) that review is inappropriate because the issue of whether Section 102(c) precludes judicial review of constitutional claims was not litigated in the court below. In fact, however, the court of appeals clearly addressed that issue (Pet. App. 24a, 27a-28a; *id.* at 33a (Ginsburg, J., concurring)). Further, after the District of Columbia Circuit decided this case, it ruled in another case that the Constitution forbids Congress from barring all judicial review of a federal constitutional claim. *Bartlett* v. *Bowen*, No. 85-5233 (D.C. Cir. Mar. 17, 1987), slip op. 2-3, 16-33.[5] Accordingly, since the court of appeals has clearly spoken on this matter, respondent's argument is without merit.[6]

2. Respondent argues (86-1294 Br. in Opp. 5-7) that the Director has exaggerated the importance of the decision below, but his claims are not persuasive. Respondent contends (*id.* at 5-6) that the Director can prevent the disclosure of confidential information by invoking the state secrets privilege or by relying on 50 U.S.C. 403(d)(3) and 403g to withhold particular information, but

[5] The decision in the *Bartlett* case was written by the author of the decision below. The Solicitor General has not yet decided whether to authorize filing a suggestion for en banc rehearing in that case.

[6] Respondent also contends (86-1294 Br. in Opp. 4-5) that review is inappropriate because he may ultimately lose on the merits of his claims. If that reasoning were accepted, then no lower court decision allowing judicial review to go forward would be reviewed by this Court, and several of this Court's recent cases would not have been decided. *E.g.*, *Bowen* v. *Michigan Academy of Family Physicians*, No. 85-225 (June 9, 1986); *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984). To paraphrase the Court's decision in *Pennsylvania* v. *Ritchie*, No. 85-1347 (Feb. 24, 1987), slip op. 8, unless the Court reviews the preclusion question now, the harm that Section 102(c) seeks to avoid—the disclosure of the facts and rationale underlying the Director's removal decisions—will occur regardless of the result on remand.

that argument misses the point.[7] The military and state secrets privilege was well established before Congress adopted the National Security Act of 1947. *Totten* v. *United States*, 92 U.S. 105 (1875); see *United States* v. *Reynolds*, 345 U.S. 1, 6-8 (1953) (discussing privilege). If Congress had believed that the privilege, combined with 50 U.S.C. 403(d)(3) and 403g, was sufficient to protect confidential information from disclosure, it would have been unnecessary to enact Section 102(c). Respondent's argument would therefore render Section 102(c) a nullity. Moreover, respondent's argument is also wrong because in some cases invoking a privilege can itself reveal sensitive information. See *CIA* v. *Sims*, 471 U.S. 159, 179 (1985) ("It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency."). Section 102(c) obviates that risk.

In addition, respondent asserts (86-1294 Br. in Opp. 6-7) that review under the APA of claims such as his will not threaten national security, since the Director's personnel decisions can be reviewed in an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. He cites no authority, however, for the proposition that a Title VII action pertaining to a discharge may be brought over objection of the Director notwithstanding the provisions of Section 102(c).[8] In any event, this case does not involve Title VII, and the fact that courts have reviewed certain of the Director's personnel actions under that law is irrelevant to the question whether the courts may review the Director's decision to dismiss respondent under the APA.

3. Respondent contends (86-1294 Br. in Opp. 7-8) that the ruling below does not conflict with the Court of Claims' decisions in *Baker* v. *United States*, 224 Ct. Cl. 760 (1980), cert. denied, 450 U.S. 1040 (1981), and *Rhodes* v. *United States*, 156 Ct. Cl. 31, cert. denied, 371 U.S. 821 (1962), but that argument plainly lacks merit. It rests on the incorrect premise that the only legal issue left in this case is whether a CIA policy against employing homosexuals is constitutional. In fact, the court of appeals directed the district court to determine whether

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[7] Respondent also states (86-1294 Br. in Opp. 5) that "the CIA has never asserted that any part of the record is classified or otherwise requires confidential treatment." That assertion is correct but immaterial because it ignores the procedural posture of this case. There has thus far been no discovery concerning the merits of petitioner's substantive claims. The issue in the court of appeals arose from the district court denial of the Director's motion to dismiss the complaint on preclusion grounds and its ruling for respondent on cross-motions for summary judgment concerning procedural issues. The limited discovery which was conducted concerned the question whether venue was proper in the District of Columbia (see C.A. App. 4). Accordingly, there was no occasion for the Director to invoke a privilege in the proceedings below. It has been the Director's position throughout the proceedings that it is unnecessary to invoke any privilege because Section 102(c) bars judicial review of his decision to dismiss respondent.

[8] Three of the cases cited by respondent did not involve the dismissal of an employee, so that there was no issue as to the preclusive effect of Section 102(c). See *Turbeville* v. *Casey*, 525 F. Supp. 1070 (D.D.C. 1981) (in ruling on venue, district court noted that the suit involved a variety of employment practices, but did not mention removal); *Brown* v. *Turner*, 490 F. Supp. 939 (D.D.C. 1980), aff'd, 659 F.2d 1199 (D.C. Cir. 1981) (claim of discrimination in hiring dismissed for lack of subject matter jurisdiction under Title VII); *Weber* v. *Turner*, 92 F.R.D. 749 (D.D.C. 1981) (order denying class certification in case alleging discrimination within the Agency). In the fourth case, *Neely* v. *CIA*, 27 Fair Empl. Prac. Cas. (BNA) 82 (D.D.C. 1981); *Neely* v. *CIA*, Civ. No. 79-3237 (D.D.C. July 21, 1982) (findings of fact and conclusions of law), aff'd mem., 744 F.2d 878 (D.C. Cir. 1984) (Table), cert. denied, 471 U.S. 1022 (1985), the plaintiff alleged that the Agency had discriminated against her in denying her a promotion and had also dismissed her in retaliation for pursuing her claim of discrimination. Because of the hybrid nature of the suit in district court, the Director did not there maintain that the action was nonreviewable under Section 102(c). To our knowledge, *Neely* is the only Title VII suit against the Agency involving the dismissal of an employee.

such a policy exceeds the Director's statutory authority (Pet. App. 27a; page 2, *supra*). Accordingly, the ruling below squarely conflicts with *Baker* and *Rhodes*, which held that the Director's authority to remove a CIA employee is "absolute" (*Baker*, 224 Ct. Cl. at 762; *Rhodes*, 156 Ct. Cl. at 36). Because the Federal Circuit has appellate jurisdiction over back-pay claims brought by former CIA employees, this conflict requires a resolution by this Court.

4. Lastly, respondent argues (86-1294 Br. in Opp. 8-11) that the decision below is correct. His argument largely reiterates the court of appeals' reasoning. Two points merit a brief response. First, respondent argues (86-1294 Br. in Opp. 9) that the text of Section 102(c) does not preclude judicial review since it lacks an express statement to that effect, unlike other statutes that vest similar summary dismissal authority in the Secretary of Defense. As we have explained (Pet. 19-20 & n.19), however, Congress relied on Section 102(c) as the "statutory precedent" for enacting these other laws (H.R. Rep. 108, 88th Cong., 1st Sess. 4 (1963)), and it granted unreviewable, summary removal authority to the Secretary of Defense because it believed that the Director already had such discretion by virtue of Section 102(c). It would be quite odd, to say the least, to conclude that the Director's authority is narrower than the Secretary's, particularly since the CIA is responsible by statute for "coordinating the intelligence activities of the several Government departments and agencies" (50 U.S.C. 403(d)), including those under the authority of the Secretary of Defense.

Second, in our petition, we argue that the nature of the agency action involved—*i.e.*, the determination whether an individual should have access to the CIA's confidential information—should inform the judgment whether Congress intended to foreclose judicial review. Respondent criticizes (86-1294 Br. in Opp. 9-10) our argument on the ground that it reflects only the Director's desire, and not Congress's intent.[9] But in *CIA* v. *Sims*, *supra*, this Court found that Congress was well aware of the need for the CIA to maintain the secrecy of its operations in order to perform its statutory responsibilities, and that this consideration was relevant to a proper construction of a companion provision of Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. 403(d)(3), which authorizes the Director to protect intelligence sources and methods against improper disclosure.[10] That consideration is equally relevant here, because the authority to decide who will have access to confidential information is essential to the Director's ability to safeguard the Agency's intelligence apparatus. See *Cole* v. *Young*, 351 U.S. 536, 546 (1956) (construing a similar summary removal statute, 5 U.S.C. 7532). Respondent has offered no reason why the considerations

[9] Respondent errs in claiming (86-1294 Br. in Opp. 8) that the only relevant sources of congressional intent on this question are the text of the Act, its legislative history, and the structure of the statutory scheme. This Court's decisions make clear that the inquiry is not so narrowly confined. See, *e.g.*, *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 11 (footnote omitted) ("at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed"); *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984) ("the nature of the administrative action involved" is relevant to the question whether Congress intended to preclude review).

[10] *Sims* recognized that Congress was acutely aware of "the practical necessities of modern intelligence gathering" (471 U.S. at 169) and "the importance of secrecy in the intelligence field" (*id.* at 172), particularly the need to protect "the heart of all intelligence operations—'sources and methods'" (*id.* at 167). *Sims* further noted that, given "the harsh realities of the present day" (*id.* at 174), a narrow construction of Section 102(d)(3) could have "dangerous consequences" (471 U.S. at 174), in part because courts, which "have little or no background in the delicate business of intelligence gathering" (*id.* at 176) and are unfamiliar with "'the whole picture'" (*id.* at 179), are not likely to determine correctly whether information should be disclosed (*ibid.*).

relevant to the meaning of Section 102(d)(3) should not be considered in construing Section 102(c).

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General

DAVID P. DOHERTY
General Counsel
Central Intelligence Agency

APRIL 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40318

JOINT

APPENDIX

Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 86-1294

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. WEBSTER,
DIRECTOR OF CENTRAL INTELLIGENCE, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 6, 1987
CERTIORARI GRANTED JUNE 8, 1987

87-1294

In the Supreme Court of the United States

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JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

85-5291

JOHN DOE

v.

WILLIAM J. CASEY, DIRECTOR, C.I.A., APPELLANT

RELEVANT DOCKET ENTRIES

Date	Filings-Proceedings
(D)08-01-86	Opinion for the Court filed by Edwards, Circuit Judge.
(D)08-01-86	Concurring opinion filed by Ginsburg, Circuit Judge.
(D)08-01-86	Opinion concurring in part and dissenting in part filed by Buckley, Circuit Judge.
(D)08-01-86	Judgment by this Court that this case is remanded for further proceedings consistent with the Opinion for the Court filed herein this date.
(D)08-01-86	Mandate order.
(D)09-17-86	Per Curiam order, sua sponte, that the Opinion for the Court filed by Circuit Judge Edwards on August 1, 1986 and the Opinion concurring in part and dissenting in part filed by Circuit Judge Buckley are hereby amended. (SEE ORDER FOR DETAILS).
(E)10-09-86	Per curiam order denying appellant's petition for rehearing. Edwards, Ginsburg and Buckley, CJs.

Date	Filings-Proceedings
(E)10-09-86	Per curiam order denying appellant's suggestion for rehearing en banc. CJ Wald, Robinson, Mikva, Edwards, Ginsburg, Bork, Starr, Silberman, Buckley and Williams, CJs. (Bork, Starr, Silberman, Buckley and Williams, CJs, voted in favor of rehearing en banc.)
(D)11-04-86	Mandate Issued.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 82-2016

JOHN DOE, PLAINTIFF

v.

WILLIAM J. CASEY,
DIR., C.I.A., DEFENDANT

RELEVANT DOCKET ENTRIES

Date	NR	Proceedings
1982		
Jul 21	1	COMPLAINT; appearance.
Jul 21	2	MOTION of pltf for leave to proceed as John Doe.
Jul 21	3	ORDER granting pltf's motion for leave to proceed as John Doe· directing Clerk to file the complaint in this action without requiring pltf to state his true name, address or telephone number. (N) SMITH, C.J.
Sep 1	6	MOTION of pltf for summary judgment; statement of material facts; declaration of John Doe; declaration of Mark H. Lynch; exhibits A, B, and C; memo of P&A's; table of contents; table of authorities.
Sep 20	10	MOTION of deft to dismiss; exhibits A and B; memo of P&A's; exhibits I, II, and III.
Sep 20	11	MOTION of deft for summary judgment; declaration of William Casey; statement of material facts; memo of P&A's.

Date	NR	Proceedings
Nov 1	18	MOTION of pltf for leave to file an amended complaint; exhibit (amended complaint).
Nov 4	20	ORDER granting motion of pltf for leave to file amended complaint. (N) PARKER, J.
Nov. 4	21	AMENDED COMPLAINT of pltf.
1983		
Feb 25		MOTION of deft to dismiss heard and taken under advisement. Cross motions for summary judgment heard and taken under advisement. (Rep: Eugene Olsen) PARKER, J.
1985		
Jan 16	49	MEMORANDUM OPINION. (N)
Jan 16	50	ORDER AND JUDGMENT denying motions of CIA to dismiss and for summary judgment and granting ptlf's motion for summary judgment and entering judgment for the pltf—and enjoining the Director of CIA to reinstate pltf. within 30 days to the administrative leave status he formerly occupied. (See Memorandum Opinion for details) (Rep: E. Olsen) PARKER, J. (mj)
Mar 15	54	NOTICE OF APPEAL by deft. from order entered on 3-15-58 [*sic*: 1-16-85]. (Government—No Fee) Copies mailed to Vincent M. Garvey and David H. White & Mark Lynch.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 82-2016

JOHN DOE, PLAINTIFF,

v.

WILLIAM J. CASEY, DEFENDANT.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is a complaint for declaratory and injunctive relief to redress the violation of plaintiff's statutory and constitutional rights. The defendant unreasonably and unlawfully terminated plaintiff's employment with the Central Intelligence Agency on the basis of plaintiff's acknowledged homosexuality. This action violated plaintiff's rights under Agency regulations and the Administrative Procedure Act and his constitutional rights to due process, equal protection of the laws, and privacy.

2. Plaintiff's claims arise under Amendments I, IV, V, and IX to the United States Constitution, 5 U.S.C. § 702, 28 U.S.C. § 1361, and 50 U.S.C. § 403(c).

3. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1361.

4. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and 1391(e).

PARTIES

5. Plaintiff Doe, a United States citizen, was employed by the Central Intelligence Agency from June 1973 until May 7, 1982. From June 1980 until his termination in May 1982, plaintiff was assigned to duties which require that his status as a CIA employee not be publicly

acknowledged. Accordingly, he cannot appear in this action in this [*sic*] true name.

6. Defendant Casey is the Director of Central Intelligence and maintains his official residence in the District of Columbia. He is sued only in his official capacity as head of the Central Intelligence Agency.

FACTUAL ALLEGATIONS

7. Following his graduation from high school, plaintiff began employment with the CIA in June 1973 as a clerk typist and performed other clerical duties through 1977.

8. Pursuant to CIA regulations in effect in 1973, plaintiff was employed on a probationary status for his first year with the Agency.

9. Plaintiff successfully completed his probationary period of employment with the CIA in 1974.

10. In November 1977, plaintiff assumed a more responsible position as an electronics technician.

11. As a result of his exemplary service and abilities, plaintiff was selected in 1978 for the CIA's upward mobility program which provided him with advanced training in his technical field.

12. Plaintiff's work with the CIA was exemplary in all respects, and his periodic fitness reports rated him as an excellent employee.

13. Plaintiff has been aware of his homosexuality and has engaged in homosexual activities since 1976.

14. Plaintiff is not embarrassed or ashamed about his homosexuality.

15. Plaintiff's family and friends and some of his neighbors are aware of his sexual orientation.

16. Accordingly, plaintiff's homosexuality does not render him susceptible to blackmail or other pressures.

17. Plaintiff, while not ashamed of his homosexuality, does not publicize it or otherwise impose his sexual orientation on others.

18. Plaintiff has never made advances toward fellow employees.

19. Plaintiff's homosexuality has in no way disrupted his working relationships with colleagues at the CIA.

20. Plaintiff has never disclosed classified information to any unauthorized person, including his homosexual partners, and a polygraph test administered by the CIA corroborated this statement.

21. Plaintiff has not engaged in any sexual relationships with foreign nationals, and a polygraph test administered by the CIA corroborated this statement.

22. On January 31, 1982, plaintiff voluntarily informed a CIA security officer of his sexual orientation.

23. Plaintiff has not disclosed his sexual orientation to the Agency before this time because of his modest sense of privacy about his personal life.

24. Plaintiff also believed that a long record of excellent service would make the Agency more likely to accept his homosexuality when it did come to the Agency's attention.

25. During plaintiff's meeting with the security officer on January 31, 1982, the officer told plaintiff that his homosexual activities violated CIA regulations.

26. On February 4, 1982, another CIA official, who plaintiff believes was the Deputy Director of the Office of Security, told plaintiff that his homosexual activities violated CIA regulations.

27. During the period following plaintiff's revelation of his homosexuality, the CIA's Office of Security conducted a series of interviews with plaintiff, in which he fully cooperated.

28. Following lengthy interviews with plaintiff, security officers administered a polygraph test to plaintiff which indicated that he truthfully answered all questions put to him, including statements that he had not disclosed classified information to his homosexual partners and had not had sexual relations with foreign nationals.

29. On March 23, 1982, plaintiff was permitted to review a five page factual report prepared by security officers on the basis of their interviews with plaintiff.

30. At that time plaintiff prepared a two page addendum to the report.

31. At the meeting on March 23, 1982, the security officers told plaintiff that they would prepare an "adjudication" of plaintiff's case on the basis of the factual report and that both documents would be forwarded to the Director of Security.

32. On April 14, 1982, a security officer informed plaintiff that the Office of Security had determined that "the circumstances of his homosexuality" pose a security threat.

33. In response to plaintiff's questions, the security officer declined to explain how or why the circumstances of plaintiff's homosexuality pose a security threat.

34. The security officer also requested that plaintiff resign from the CIA.

35. Plaintiff refused to resign.

36. The security officer told plaintiff that since he refused to resign, the Office of Security would recommend that the Director of Central Intelligence terminate plaintiff's employment.

37. At the meeting on April 14, 1982, the security officer also informed plaintiff that the Agency will give a positive recommendation to any prospective employer that might inquire about plaintiff. However, the security officer also stated if plaintiff applies for a job which requires a security clearance, either with the government or a private organization that performs government contracts, the CIA will inform the prospective employer that the Agency determined that plaintiff is a security threat because of his homosexuality.

38. An assistant general counsel at the CIA subsequently informed plaintiff that he is obliged to inform the

CIA whenever he applies for a job that requires a security clearance so the Agency can inform the prospective employer that the CIA determined that plaintiff is a security threat because of his homosexuality.

39. On April 16, 1982, the Deputy General Counsel of the CIA informed plaintiff's counsel that any written submission to the Director of Central Intelligence on plaintiff's behalf would have to be received by the close of business on April 20, 1982, in order to be considered by the Director.

40. On April 20, 1982, plaintiff's counsel hand-delivered a letter to defendant Casey requesting that defendant overrule the recommendation to terminate plaintiff's employment or, in the alternative, provide plaintiff with the opportunity to learn of and respond to the charges against him.

41. Plaintiff's counsel requested that he and plaintiff be provided with (a) the Agency's substantive and procedural regulations concerning this matter, (b) the factual report which plaintiff had been permitted to read but not retain or show to his counsel, (c) a written statement of the reasons why the Office of Security determined that the circumstances of plaintiff's homosexuality pose a security threat, and (d) an opportunity to respond to these charges.

42. On May 11, 1982, the Deputy General Counsel of the CIA wrote to plaintiff's counsel informing him that defendant Casey had "deemed it necessary and advisable in the interests of the United States to terminate [plaintiff's] employment" pursuant to 50 U.S.C. § 403(c).

43. This letter also stated that defendant Casey had reached his decision on the basis of a review of the facts of plaintiff's case, plaintiff's memorandum commenting on those facts, the Office of Security's evaluation of the security significance of those facts, and the letter of plaintiff's counsel.

44. Plaintiff has received no other statement of the reasons for his termination.

45. CIA regulations provide that non-probationary employees normally will not be separated involuntarily from the Agency without certain procedural protections, including the opportunity to be informed of the reasons for proposed separation and an opportunity to respond orally or in writing within ten days.

46. Plaintiff was terminated without observance of the foregoing procedures, and no CIA official provided any explanation for this departure from normal Agency procedures.

47. Pursuant to CIA regulations, policies, practices, and written materials provided to Agency employees, plaintiff, having successfully completed this probationary period of employment, had a reasonable expectation of continued employment with the CIA so long as his services did not become redundant and he performed his work well, complied with the Agency's written standards of personal conduct, and protected classified information from unauthorized disclosure.

48. Defendant's erroneous determination that plaintiff's homosexuality poses a security threat and the CIA's announced intention to communicate this determination to prospective employers whose work requires a security clearance impose on plaintiff a burden and stigma which substantially foreclose his employment opportunities in his area of technical expertise where a security clearance is often required.

49. Because of the training and experience which plaintiff has received in his area of technical expertise, his most promising prospects for future employment lie with employers where a security clearance is required.

50. Plaintiff was subjected to far more extensive examination of the intimate details of his personal life than

are similarly-situated heterosexual CIA employees whose sexual activities could pose a security threat.

51. The CIA does not routinely attempt to determine whether current employees are homosexuals.

52. Plaintiff's termination in spite of his cooperation with the Agency and his demonstrated ability to maintain security is inconsistent with the Agency's treatment of employees who engage in pre-marital and extra-marital heterosexual relationships that pose a security threat.

53. The special treatment to which plaintiff was subjected because of the "circumstances of his homosexuality" is not rationally related to national security concerns.

54. Plaintiff's continued employment with the CIA is in no way inconsistent with "the interests of the United States."

55. Other government agencies which are responsible for protecting the national security, including the military services, the Department of Defense, the National Security Agency, and the Department of State, employ acknowledged homosexuals who are not susceptible to blackmail and whose homosexuality does not interfere with their work in positions that involve access to information that is as highly classified as that to which plaintiff had access in the CIA.

56. 9.13% of the total population has had either extensive or more than incidental homosexual experience. Kinsey, Pomeroy & Martin, *Sexual Behavior in the Human Male* 650-51 (1948); Kinsey, Pomeroy, Martin & Gebhard, *Sexual Behavior in the Human Female* 473-74 (1953).

57. Since a statistically significant percentage of the population engages in homosexual activity on a regular basis, and since the CIA does not routinely attempt to determine whether current employees are homosexuals, a statistically significant number of the CIA's employees are likely to be homosexuals.

58. The CIA's policy of regarding acknowledged homosexuals as security threats is irrational because it encourages the statistically significant number of homosexuals who work for the Agency to be secretive about their sexual orientation and therefore susceptible to blackmail and other unstabilizing pressures.

LEGAL CLAIMS

59. Defendant's decision to terminate plaintiff violated the Administrative Procedure Act, 5 U.S.C. § 706, because it was arbitrary and capricious, an abuse of discretion, and was reached without procedure required by law and CIA regulations.

60. Defendant's decision to terminate plaintiff deprived plaintiff of the elements of fundamental fairness to which he is entitled under the Fifth Amendment because the decision was reached without providing plaintiff and his counsel with (a) the Agency's substantive and procedural regulations concerning this matter, (b) a copy of the factual report prepared by the Office of Security, (c) a copy of the reasons why the Office of Security determined that the circumstances of plaintiff's homosexuality pose a security threat, (d) an opportunity to respond to these charges, and (e) a statement of the reasons for defendant's decision to terminate plaintiff.

61. Defendant's termination of plaintiff's employment deprived him of property without due process of law in violation of the Fifth Amendment.

62. Defendant's determination that plaintiff's homosexuality poses a security threat and the CIA's intention to communicate this determination to prospective employers deprives plaintiff of liberty without due process of law in violation of the Fifth Amendment.

63. Defendant's termination of plaintiff's employment placed an unjustifiable burden on plaintiff's fundamental right to privacy guaranteed by the First, Fourth, Fifth, and Ninth Amendments.

64. Defendant's termination of plaintiff's employment deprived him of the equal protection of the laws secured by the Fifth Amendment.

65. Defendant had a clear duty not to violate the law and deprive plaintiff of his rights in the ways described in paragraphs 59-64.

66. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff respectfully requests the Court to grant the following relief:

A. A judgment declaring that defendant's decision to terminate plaintiff's employment was arbitrary and capricious and an abuse of discretion, was reached without observance of procedure required by law, and violated plaintiff's rights secured by the First, Fourth, Fifth, and Ninth Amendments.

B. An injunction ordering defendant to reinstate plaintiff to the position he held with the Central Intelligence Agency prior to the time plaintiff informed the Agency of his homosexuality.

C. In the alternative, an injunction ordering defendant (1) to reinstate plaintiff to the administrative leave status in which he was placed after he informed the Agency of his homosexuality, (2) to reconsider plaintiff's security suitability, and (3) to provide plaintiff and his counsel with all relevant regulations and policy statements, a statement of the reasons for the proposed termination of plaintiff, a full and fair opportunity to respond to those reasons, and a statement of the reasons for any adverse final determination.

D. Such other and further relief, including costs and attorney's fees, as the Court may deem just and proper.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 82-2016

JOHN DOE, PLAINTIFF,

v.

WILLIAM J. CASEY, DEFENDANT.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

In support of his motion for summary judgment and pursuant to Local Rule 1-9(h), plaintiff states the following material facts as to which there is no genuine issue:

1. At the age of 17, following his graduation from high school, plaintiff began employment with the CIA in June 1973 as a clerk typist and performed other clerical duties through 1977. (Doe Declaration ¶2.)

2. Pursuant to CIA regulations in effect in 1973, plaintiff was employed on a probationary status for his first year with the Agency. (*Id.* ¶3.)

3. Plaintiff successfully completed his probationary period of employment with the CIA in 1974. (*Id.* ¶3.)

4. In November 1977 plaintiff assumed a more responsible position as an electronics technician. (*Id.* ¶5.)

5. In 1978 plaintiff was selected for the CIA's upward mobility program which provided him with advanced training in his technical field. (*Id.* ¶5.)

6. Plaintiff's work with the CIA was exemplary in all respects, and his periodic fitness reports gave him either strong or outstanding ratings. (*Id.* ¶6.)

7. Plaintiff has been aware of his homosexuality and has engaged in homosexual activities since 1976. (*Id.* ¶7.)

8. Plaintiff is not embarrassed or ashamed about his homosexuality. (*Id.* ¶8.)

9. Plaintiff's family and friends and some of his neighbors are aware of his sexual orientation. (*Id.* ¶8.)

10. Plaintiff's homosexuality does not render him susceptible to blackmail or other pressures. (*Id.* ¶8.)

11. Plaintiff, while not ashamed of his homosexuality, does not publicize it or otherwise impose his sexual orientation on others. (*Id.* ¶9.)

12. Plaintiff has never made advances toward fellow employees. (*Id.* ¶9.)

13. Plaintiff's homosexuality has in no way disrupted his working relationships with colleagues at the CIA. (*Id.* ¶9.)

14. Plaintiff has never disclosed classified information to any unauthorized person, including his homosexual partners. (*Id.* ¶'s 10, 17.)

15. Plaintiff has not engaged in any sexual relationships with foreign nationals. (*Id.* ¶'s 10, 17.)

16. On January 28, 1982, plaintiff voluntarily informed a CIA security officer of his sexual orientation. (*Id.* ¶11.)

17. Plaintiff had not disclosed his sexual orientation to the Agency before this time because of his sense of privacy about his personal life. (*Id.* ¶11.)

18. Plaintiff also believed that a long record of excellent service would make the Agency more likely to accept his homosexuality when it did come to the Agency's attention. (*Id.* ¶11.)

19. Furthermore, plaintiff did not believe that he was required to report his sexual activities to any greater extent than heterosexuals are required to report their sexual activities. (*Id.* ¶12.)

20. Plaintiff's understanding, based on the Agency's security lectures and required readings on security matters, was that there is no requirement to report sexual activities unless they risk the compromise of security. (*Id.* ¶12.)

21. Although plaintiff suspected that the CIA would not approve of homosexuality in the same way that much of society does not approve of homosexuality, none of the lectures he received or materials he read on security matters during his eight and a half years with the Agency stated that homosexuality was prohibited conduct. (*Id.* ¶12.)

22. A CIA publication prepared "for the information of all CIA employees" states in a section entitled "An Employee's Private Life" that: "Except for the continuing responsibility to avoid disclosure of information affecting the national security, Agency employees are under no formal restrictions beyond those governing the conduct of Federal workers as a whole." (Plaintiff's Exhibit C.)

23. During plaintiff's meeting with a CIA security officer on January 29, 1982, the officer told plaintiff that his homosexual activities violated CIA regulations. (Doe Dec. ¶13.)

24. On February 2, 1982, another CIA official, who plaintiff believes was the Deputy Director of the Office of Security, told plaintiff that his homosexual activities violated CIA regulations. (*Id.* ¶13.)

25. On February 2, 1982, a security officer informed plaintiff that he was being placed on administrative leave. Under this status, plaintiff did not have to report for work, but the CIA continued to pay him. This arrangement remained in effect until May 7, 1982, the effective date of plaintiff's termination. (*Id.* ¶15.)

26. On February 10, 1982, the Deputy General Counsel of the CIA told plaintiff's counsel that homosexuality was not a *per se* ground for dismissal but that it was a security concern that was evaluated on a case-by-case basis in light of all the circumstances of each case. (Lynch Dec. ¶3.)

27. On February 12 and 17, 1982, plaintiff was interviewed by a polygraph officer who questioned him at great

length about his homosexuality and possible security violations. The first interview lasted approximately 4 hours and the second interview lasted approximately 6 hours. (Doe Dec. ¶17.)

28. At the end of each session, the officer administered a polygraph test on specific questions. At the end of the second session, the officer told plaintiff that the polygraph indicated that he had truthfully answer all questions on which he was tested, including plaintiff's statements that he had not disclosed classified information to his homosexual partners and had not had sexual relations with foreign nationals. (*Id.* ¶17.)

29. On March 23, 1982, plaintiff was permitted to review a five page factual report prepared by the polygraph officer on the basis of his interviews with plaintiff. (*Id.* ¶18.)

30. At that time plaintiff prepared a two page addendum to the report. (*Id.* ¶18.)

31. At the meeting on March 23, 1982, the security officers told plaintiff that they would prepare an "adjudiction" of plaintiff's case on the basis of the factual report and that both documents would be forwarded to the Director of Security. (*Id.* ¶18.)

32. On April 14, 1982, a security officer informed plaintiff that the Office of Security had determined that "the circumstances of his homosexuality" pose a security threat. (*Id.* ¶19.)

33. In response to plaintiff's questions, the security officer declined to explain how or why the circumstances of plaintiff's homosexuality pose a security threat. (*Id.* ¶19.)

34. The security officer also requested that plaintiff resign from the CIA. (*Id.* ¶20.)

35. Plaintiff refused to resign. (*Id.* ¶20.)

36. During the meeting on April 14, 1982, the security officer told plaintiff that since he refused to resign, the

Office of Security would recommend that the Director of Central Intelligence terminate plaintiff's employment. (*Id.* ¶20.)

37. On April 16, 1982, the Deputy General Counsel of the CIA informed plaintiff's counsel that any written submission to the Director of Central Intelligence on plaintiff's behalf would have to be received by the close of business on April 20, 1982, in order to be considered by the Director. (Lynch Dec. ¶5.)

38. In order to prepare an appeal to the Director of Central Intelligence, plaintiff's counsel on April 16, 1982, asked the Deputy General Counsel if he could have access to the factual report and the adjudication which the office of Security had prepared and which would be forwarded to the DCI. (*Id.*)

39. The Deputy General Counsel informed plaintiff's counsel that neither he nor plaintiff would be permitted access to the factual report or the adjudication. (*Id.*)

40. On April 20, 1982, plaintiff's counsel handdelivered to the CIA a letter to defendant Casey requesting that defendant overrule the recommendation to terminate plaintiff's employment or, in the alternative, provide plaintiff with the opportunity to learn of and respond to the charges against him. (Plaintiff's Exhibit A.)

41. Plaintiff's counsel requested that he and plaintiff be provided with (a) the Agency's substantive and procedural regulations concerning this matter, (b) the factual report which plaintiff had been permitted to read but not retain or show to his counsel, (c) a written statement of the reasons why the Office of Security determined that the circumstances of plaintiff's homosexuality pose a security threat, and (d) an opportunity to respond to these charges. (*Id.*)

42. The CIA never made any response to plaintiff's request to reconsider his case under fair procedures. (Lynch Dec. ¶6.)

43. On May 12, 1982, a security officer informed plaintiff that the Director of Central Intelligence had terminated his employment with the Agency, effective May 7, 1982. The officer did not give plaintiff any reasons for the DCI's decision. (DOE Dec. ¶21.)

44. On May 11, 1982, the Deputy General Counsel of the CIA wrote to plaintiff's counsel informing him that defendant Casey had "deemed it necessary and advisable in the interests of the United States to terminate [plaintiff's] employment" pursuant to 50 U.S.C. § 403(c). (Plaintiff's Exhibit B.)

45. This letter also stated that defendant Casey had reached his decision on the basis of a review of the facts of plaintiff's case, plaintiff's memorandum commenting on those facts, the Office of Security's evaluation of the security significance of those facts, and the letter of plaintiff's counsel. (*Id.*)

46. Plaintiff has received no other statement of the reasons for his termination. (Doe Dec. ¶21).

47. CIA regulations provide that non-probationary employees normally will not be separated involuntarily from the Agency without certain procedural protections, including the opportunity to be informed of the reasons for proposed separation and an opportunity to respond orally or in writing within ten days. (Headquarters Regulation 20-27m, Plaintiff's Exhibit D.)

48. Plaintiff was terminated without observance of the procedures set forth in HR 20-27m, and no CIA official provided any statement of reasons for this departure from normal Agency procedures. (Lynch Dec. ¶10.)

49. CIA Headquarters Regulation 20-27, "Separation By The Agency" sets forth the following grounds for termination of nonprobationary employees: (i) failure to meet the work and efficiency standards of the Agency; (ii) failure to meet security or medical standards; (iii) failure to meet standards of conduct set forth in HR 20-6; (iv)

abandonment of position; (v) legal incompetence; (vi) personnel redundancy; (vii) low ratings in performance and potential; (viii) a determination by the Director of Central Intelligence that termination is necessary and advisable in the interests of the Agency or for other reasons contributing to the efficiency of the Ageny. (Plaintiff's Exhibit D.)

50. The standards of conduct set forth in HR 20-6 make no mention of either homosexual or heterosexual activity. (Lynch Dec. ¶11.)

51. A CIA publication prepared "for the information of all CIA employees" states: "The Agency has the authority to separate involuntarily any employee who, in the judgment of the Director, has failed to carry out his duties responsibly and effectively." (Plaintiff's Exhibit C.)

52. At the beginning of his employment with the CIA, plaintiff was told by Agency officials that if he successfully completed his probationary period, the CIA would continue to employ him so long as his services were needed, he did his work well, complied with security regulations, and protected classified information from unauthorized disclosure. (DOE Dec. ¶4.)

53. At the meeting on April 14, 1982, the security officer informed plaintiff that the Agency will give a positive recommendation to any prospective employer that might inquire about plaintiff. However, the security officer also stated if plaintiff applies for a job which requires a security clearance, either with the government or a private organization that performs government contracts, the CIA will inform the prospective employer that the Agency determined that plaintiff is a security threat because of his homosexuality. (Doe Dec. ¶22.)

54. An assistant general counsel at the CIA subsequently informed plaintiff that he is obliged to inform the CIA whenever he applies for a job that requires a security clearance so the Agency can inform the prospective em-

ployer that the CIA determined that plaintiff is a security threat because of his homosexuality (*Id.* ¶22.)

55. Because of the training plaintiff received and the experience he developed in his area of expertise while employed by the CIA, his most promising prospects for future employment lie with employers where a security clearance is required. (*Id.* ¶22.)

56. Plaintiff's ability to get a job which requires a security clearance is foreclosed by the CIA's intention to inform prospective employers that the Agency determined plaintiff to be a security threat. (*Id.* ¶22.)

DATED: August 26, 1982

Respectfully Submitted,

MARK H. LYNCH
Mark H. Lynch

SUSAN W. SHAFFER
Susan W. Shaffer

American Civil Liberties Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5388

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 82-2016

JOHN DOE, PLAINTIFF,

v.

WILLIAM CASEY, DEFENDANT.

DECLARATION OF JOHN DOE

I, John Doe, state as follows:

1. I am the plaintiff in the above-captioned action. Although I cannot sign a public affidavit with my true name, I attest to the truthfulness of the following statements as if I were signing this declaration with my true name.

2. At the age of 17, following graduation from high school, I began employment with the CIA in June 1973 as a clerk typist and performed other clerical duties through 1977.

3. Under CIA regulations in effect in 1973, I was employed on a probationary status for my first year with the Agency. I successfully completed my probationary period in 1974.

4. At the beginning of my employment with the CIA, I was told by CIA officials that if I successfully completed my probationary period, the CIA would continue to employ me so long as my services were needed, I did my work well, complied with security regulations, and protected classified information from unauthorized disclosure.

5. In November 1977, I was selected for a more responsible position as an electronics technician. In 1978 I was selected for the CIAs upward mobility program which

provided me with advanced training in my technical field. From June 1980 until my termination in May 1982, I was assigned to duties which require that my status as an Agency employee not be publicly acknowledged.

6. Throughout my employment with the CIA, the fitness reports which were periodically prepared by my supervisors gave me either strong or outstanding ratings.

7. Since 1976, I have been aware that I am a homosexual and have engaged in homosexual activities.

8. I am not embarrassed or ashamed about my homosexuality. My family and friends and some of my neighbors are aware of my sexual orientation. Consequently, no one could blackmail me or subject me to other pressure by threatening to reveal my homosexuality to anyone.

9. While I am not ashamed of my homosexuality, I do not publicize it or attempt to impose my sexual orientation on others. I have never made advances toward fellow employees, and my homosexuality has not affected my working relationships with colleagues at the CIA in any way.

10. I never have disclosed classified information to any unauthorized person, including my homosexual partners, and I never have engaged in any sexual relationships with foreign nationals.

11. On January 28, 1982, I voluntarily informed a CIA security officer of my sexual orientation. I had not disclosed my sexual orientation to the Agency before this time because of my sense of privacy about my personal life. I also believed that a long record of excellent service would make the Agency more likely to accept my homosexuality when it did come to the Agency's attention.

12. Furthermore, I did not believe that I was required to report my sexual activities to any greater extent than heterosexuals are required to report their sexual activities. My understanding, based on security lectures and required

reading on security matters, was that unless sexual activities risk the compromise of security, there is no requirement to report them. Although I suspected that the CIA would not approve of homosexuality in the same way that much of our society does not approve of homosexuality, none of the security lectures I received or security materials I was required to read during my eight and a half years with the Agency stated that homosexuality was prohibited conduct.

13. During a meeeting with a CIA security officer on January 29, 1982, I related the history of my homosexuality and answered his questions about possible security violations. This officer told me that my homosexual activities had violated CIA regulations. On February 2, 1982, another CIA official, who I believe was the Deputy Director of the Office of Security, also told me that my homosexual activities had violated CIA regulations.

14. On February 2, 1982, a security officer asked me to take a polygraph test during which I would be asked questions about my homosexuality. Since I had been told that homosexuality violated security regulations, I hesitated to submit to a polygraph test if I was going to be fired regardless of what the test showed. Furthermore, while I was willing to answer questions about security matters, I was afraid that the polygraph examiner would ask questions about intimate personal details of my sexual activities which I do not think are relevant to security. Consequently, I declined to take the polygraph test until I talked to a lawyer.

15. After I declined to take the polygraph test until speaking to a lawyer, a security officer informed me that I was being placed on administrative leave. Under this status, I did not have to come to work, although I did have to check in with the Agency by telephone each day, and

the Agency continued to pay me. I remained on administrative leave until the effective date of my termination, May 7, 1982.

16. On February 10, 1982, my lawyer met with CIA lawyers who told him that homosexuality was not an automatic ground for dismissal but was a factor that was considered in determining suitability for employment with the CIA. My lawyer was also told that the polygraph test would not include questions about intimate details of my sexual relations. On the basis of these assurances I agreed to be tested.

17. On February 12 and 17, 1982, I was interviewed by a polygraph officer who questioned me at great length about my homosexuality and possible security violations. The first interview lasted approximately 4 hours and the second interview lasted approximately 6 hours. At the end of each session, the officer administered a polygraph test on specific questions. At the end of the second session, he told me that the polygraph indicated that I had truthfully answered all questions on which I was tested, including my statements that I had not disclosed classified information to my homosexual partners and had not had sexual relations with foreign nationals.

18. On March 23, 1982, I met with two security officers to review a five page factual report prepared by the polygraph officer on the basis of his interviews with me. At that time I was permitted to prepare a two page addendum to the report. The security officers told me that they would prepare an "adjudication" of my case on the basis of the factual report and that both documents would be forwarded to the Director of Security.

19. On April 14, 1982, a security officer informed me that the Office of Security had determined that "the circumstances of my homosexuality" pose a security threat. When I asked him how or why the circumstances of my homosexuality pose a security threat, he refused to give any further explanation.

20. The security officer then requested that I resign from the CIA. When I said that I refuse to resign, he told me that the Office of Security would recommend that the Director of Central Intelligence terminate my employment.

21. On May 12, 1982, a security officer informed me that the Director of Central Intelligence had terminated my employment with the Agency, effective May 7, 1982. The officer did not give me any reasons for the DCI's decision, and no one else has given me any reasons beyond those in the letter dated May 11, 1982 from the Deputy General Counsel to my lawyer. (Plaintiff's Exhibit A.)

22. At the meeting on April 14, 1982, the security officer said that the Agency will give a positive recommendation to any prospective employer that asked for one. However, he also said that if I applied for a job which requires a security clearance, either with the government or a private organization that performs government contracts, the CIA will inform the prospective employer that the Agency has determined that I am a security threat because of my homosexuality. An assistant general counsel at the CIA later told me that I am required to inform the CIA whenever I apply for a job that requires a security clearance so the Agency can inform the prospective employer that the CIA has determined that I am a security threat because of my homosexuality. Because of the training I received and experience I developed in my area of technical expertise, my best chances for rewarding future employment are with employers where a security clearance is required. I believe that it will be impossible to get such jobs because prospective employers will learn that the Agency has determined that I am a security threat, even though I believe that determination was wrong.

I decide under penalty of perjury that the foregoing is true and correct. Executed on August 23, 1982.

/s/ JOHN DOE
John Doe

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 82-2016

JOHN DOE, PLAINTIFF,

v.

WILLIAM CASEY, DEFENDANT.

DECLARATION OF MARK H. LYNCH

I, Mark H. Lynch, state as follows:

1. I, am an attorney for the plaintiff in the above-captioned action.

2. On February 10, 1982, I met with the Deputy General Counsel and an Assistant General Counsel of the Central Intelligence Agency to discuss plaintiff's concerns over the Agency's request that he take a polygraph test concerning his homosexuality. As a result of what he had been told by CIA security officers, plaintiff believed that homosexuality was a *per se* ground for dismissal and that he would be fired no matter how the polygraph test came out. He was also concerned that the polygraph test would involve questions about the intimate details of his sexual activities.

3. During our February 10 meeting, the Deputy General Counsel told me that homosexuality is not a *per se* ground for dismissal. He said that it was a security concern that was evaluated on a case-by-case basis in light of all the circumstances of each case. He also gave me a copy of the CIA's regulations on polygraph tests which prohibit questions that constitute an unwarranted invasion of personal privacy. He assured me that plaintiff would not be asked questions about the intimate details of his sexual activities.

4. On April 14, 1982, plaintiff was informed by a CIA official that the Office of Security had determined that the circumstances of his homosexuality present a security threat and that since he refused to resign, the Office of Security would recommend that the Director of Central Intelligence terminate plaintiff's employment.

5. On April 16, 1982, I discussed with the CIA's Deputy General Counsel procedures for presenting plaintiff's side of this controversy to the Director. In response to my request for access to the documentation which would be presented to the DCI, I was informed that neither I nor plaintiff would be permitted to examine either the factual report prepared on the basis of plaintiff's polygraph sessions—which previously had been shown to him—or the Office of Security's "adjudication" of plaintiff's case which sets forth its evaluation of the security significance of the facts contained in the report. I was further informed that I could submit an appeal on plaintiff's behalf in writing, but any such appeal would have to be submitted by the close of business on April 20, 1982.

6. On April 20, 1982, I caused an appeal letter to the Director to be hand-delivered to the CIA. This letter is attached hereto as Plaintiff's Exhibit A. In this appeal I requested that the Director overrule the recommendation to terminate plaintiff's employment or, in the alternative, provide plaintiff with the opportunity to learn of and respond to the charges against him. In particular, I requested that my client and I be provided with (a) the Agency's substantive and procedural regulations concerning this matter, (b) the factual report which the Office of Security had prepared, (c) a written statement of the reasons why the Office of Security determined that the circumstances of plaintiff's homosexuality pose a security threat, and (d) an opportunity to respond to these charges. I never received any response to this request that plaintiff's case be considered under fair procedures.

7. I subsequently received a letter dated May 11, 1982, from the Deputy General Counsel informing me that the Director of Central Intelligence had decided to terminate plaintiff's employment. This letter is attached hereto as Plaintiff's Exhibit B.

8. Attached hereto as Plaintiff's Exhibit C is a portion of a CIA booklet which was submitted as an exhibit in another lawsuit, *Jordan* v. *CIA*, Civ. No. 78-2036 (D.D.C.).

9. Attached hereto as Plaintiff's Exhibit D is CIA Headquarters Regulation 20-27, which governs involuntary separations of employees from the Agency. These regulations were released to me by the Office of General Counsel on June 30, 1982, after plaintiff had been terminated by the Director.

10. Although HR 20-27m provides for certain procedures in terminating employees, plaintiff was terminated without observances of these procedures, and no CIA official has provided us with a statement of reasons for this departure from normal Agency procedures.

11. HR 20-27e makes reference to "standards of conduct" set forth in HR 20-6. In response to my request, the Office of General Counsel provided me with a copy of HR 20-6, which I read. The standards of conduct discussed therein pertain to conflicts of interest, presentation and acceptance of gifts and decorations, and participation in riots and civil disturbances. They make no mention of homosexuality or other sexual matters.

I declare under penalty or perjury that the foregoing is true and correct. Executed this 25th day of August, 1982.

/s/ MARK H. LYNCH
Mark H. Lynch

Mark H. Lynch
Attorney at Law
122 Maryland Avenue, N. E.
Washington, D. C. 20002

(202) 544-5388

April 20, 1982

Mr. William Casey
Director of Central Intelligence
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Casey:

I am writing on behalf of a client who is an Agency employee who has been asked by the Office of Security to resign because he has engaged in homosexual activities. Since my client's status as an Agency employee is a classified matter, I will refer to him as John Doe in this letter. Mr. Doe has declined to resign, and the Office of Security has informed him that the Office will recommend that you terminate Mr. Doe from service with the Agency. My purpose in writing is to urge you not to terminate Mr. Doe, or in the alternative to permit further consideration of this matter in a fashion that will afford Mr. Doe fuller procedural protections than have been afforded to date.

Mr. Doe has cooperated extensively with the Office of Security in answering questions about his homosexuality and has taken a polygraph test which indicated that he truthfully answered the questions put to him. What appear to us to be the relevant facts can be briefly summarized. Mr. Doe is twenty-seven years old has been employed with the Agency since he was seventeen. His work has been exemplary in all respects. He has engaged in homosexual

activities since he was twenty-one. Following a routine security briefing which urged employees to be forthcoming about any aspect of their personal lives that could have any conceivable security implications, Mr. Doe voluntarily informed a security officer of his homosexuality at the end of January 1982.

Mr. Doe is not ashamed of his homosexuality and has no compunction about others knowing of his homosexuality. His parents and some of his neighbors are aware of it. Thus, it does not appear that Mr. Doe is susceptible to blackmail or other pressure because of his homosexuality. While not embarrassed about his homosexuality, Mr. Doe does not feel obliged to publicize it or to impose his sexual preferences on the sensibilities of others. Thus, his homosexuality has not caused any disruption of his working relationships with his colleagues. His reason for not disclosing his homosexuality to the Agency was his modest sense of privacy about his personal life rather than any sense of shame, embarrassment, or fear. He also reasoned that if he could establish a record of satisfactory service over a number of years, the Agency would be more likely to accept his homosexuality when it finally came to the Agency's attention. Mr. Doe has not disclosed classified information to his homosexual partners (or any other person), and he has not engaged in any relationship with foreign nationals.

On March 23, 1982, Mr. Doe was provided with an opportunity to review a factual report which was based on his interviews with security officers. At that time he also prepared a two-page addendum to that report. I understand that these documents will be presented to you in your determination of this matter. On April 14, 1982, a security officer informed Mr. Doe that the Office of Security had determined that "the circumstances of his homosexuality" pose a security threat. When Mr. Doe attempted to obtain a more precise statement of the reasons

for this conclusion, the officer would only identify the following general factors without any elaboration: the duration and frequency of Mr. Doe's homosexual activity, his failure to reveal his homosexuality to the Agency for six years, and his unwillingness to identify his homosexual partners. (This account of the reasons for concluding that Mr. Doe's homosexuality presents a security threat is based on his recollection of his conversation with the security officer. Regrettably, the Agency officials involved in this matter have refused to provide us with any written statement of the security officer's determination or the reasons therefor.)

I would like to address first the suggestion that Mr. Doe has not adquately cooperated with the Office of Security. It is true that he has declined to provide the identity of his homosexual partners. His reason is, of course, his desire to protect the privacy of those with whom he has been intimate, and his position on this issue, we submit, is quite reasonable. Since he has truthfully answered that he has not disclosed classified information and that he has not engaged in sexual relations with foreign nationals, further inquiry into the identity of his partners would be an unwarranted intrusion on the privacy of those individuals. While we do not know for certain, we suspect that the Agency does not require unmarried heterosexuals to disclose the identity of their sexual partners in the absence of some firm foundation for believing that their sexual activities give rise to a security problem. If we are correct in this belief, then the same standard of respect for the privacy of third parties should be observed in cases concerning homosexuals. However, if the issue of Mr. Doe's reluctance to identify his partners is the sticking point for the Agency, we would like to discuss this matter further in order to attempt to satisfy the Agency's concerns.

With respect to the merits of the determination of the Office of Security, we do not perceive how the circum-

stances of Mr. Doe's homosexuality present an articulable or reasoned threat to security. He is not susceptible to blackmail, he has protected classified information, and he has performed his work well. In fact, he has demonstrated for six years that it is possible to engage in homosexual activity and to work for the CIA without compromising security. This record of past performance clearly contradicts the view of the Office of Security and indicates that Mr. Doe can continue to work for the Agency.

It appears that but for Mr. Doe's homosexuality, there would be no concern over his suitability for continued employment. In this regard, we ask you to consider whether a history of heterosexual activity similar to Mr. Doe's history of homosexual activity would present a valid reason for taking the extreme step of terminating an employee. We do not believe that the Agency would take such action in the case of an unmarried twenty-seven year old heterosexual who for six years engaged in the same level of sexual activity as Mr. Doe has, so long as his or her sexual activities did not subject the employee to blackmail and did not involve the disclosure of classified information. On the basis of the limited information which has been furnished to Mr. Doe, it appears that thus far he has been judged by a special standard solely because of his homosexuality and that this special standard is not rationally related to security concerns. Since such discrimination is unwarranted and fundamentally unfair, we respectfully urge you to overrule the recommendation to terminate Mr. Doe.

We also request that in considering this matter, you take into account the recent experience of the National Security Agency in deciding to retain a homosexual employee on the condition that he inform his family of his homosexuality. If NSA was able to determine that homosexuality is not inconsistent with sound security practices, the CIA ought to be able to reach the same conclusion. In this

regard, we also respectfully suggest that you seek the counsel of the Deputy Director of Central Intelligence, Admiral Inman, who served as Director of NSA at the time that agency addressed the issue of homosexuality.

If on the record now available to you, you are not able to overrule the recommendation to terminate Mr. Doe, we request that you authorize further consideration of this matter in a fashion that will permit Mr. Doe to rebut effectively the adverse determination that has been reached about him. In this regard, we must protest that the handling of this matter to date has been extremely defective in terms of even minimal procedural due process. At the very least, Mr. Doe and his counsel should be provided with the Agency's policies and regulations—both substantive and procedural—governing matters such as this and a written statement of the facts and the reasons on which the Office of Security has reached its position. We also believe that such a statement of reasons should be more specific and less conclusory than the oral statement that was given to Mr. Doe. We further note that I have been denied access to the factual report which has been prepared by the Office of Security, and we regard this as a very serious denial of effective legal representation.

While the nature of any further administrative consideration of this issue is a matter for you to decide (subject to the minimal procedures outlined above), we believe that additional informal discussion would be most productive. We appreciate that this may be an unusual matter for the Agency, and Mr. Doe seeks the opportunity to respond fully to the Agency's concerns over his continued employment. In order to do this, however, he must be fully appraised of these concerns so that he can respond to them. If given this opportunity, Mr. Doe is confident that he can persuade the Agency that he is suitable for continued employment.

Finally, we stress that Mr. Doe's paramount objective is to remain in the Agency. He has no desire to publicize his case or mark it as a precedent if he can be permitted to continue in his work. Thus, he is prepared to continue to cooperate with the Agency, as he has thus far, in attempting to resolve this issue. However, Mr. Doe is also prepared to vindicate his position through litigation if necessary, although he sincerely hopes that such action will not be necessary. Accordingly, we seek your cooperation in arriving at a reasoned and sensible resolution of this matter that will accommodate the interests of all concerned.

Thank you very much for your attention to this matter.

/s/ MARK H. LYNCH
Mark H. Lynch

MHL/kgc

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Office of General Counsel

11 May 1982

Mark H. Lynch, Esq.
122 Maryland Avenue, N.E.
Washington, D.C. 20002

Dear Mark:

This is to inform you of the decision the Director of Central Intelligence has reached regarding the continued employment of your client by this Agency. The Director has reviewed the facts of your client's case, your client's memorandum commenting upon those facts, the Office of Security's evaluation of the security significance of those facts, and the statement submitted by you in your client's behalf.

After careful consideration of this matter, the Director has deemed it necessary and advisable in the interests of the United States to terminate your client's employment with this Agency pursuant to section 102(c) of the National Security act of 1947, as amended.

Sincerely,

/s/ ERNEST MAYERFELD
Ernest Mayerfeld
Deputy General Counsel

* * * * *

FOREWORD

The attached is for the information of all CIA employees, especially CIA personnel recruiters, domestic contact officers, CIA students at the senior service schools, and other officials who are in regular contact with the public. It serves as a supplement to three unclassified Agency publications: the 1971 "Blue Book," the Director's address of 4 April 1971 to the American Society of Newspaper Editors on "Global Intelligence and the Democratic Society," and the brochure on personnel recruitment. Its purpose is to help answer the kinds of questions about CIA and its activities which frequently appear in the public media and are discussed by the public.

The booklet in this printed form is classified "Confidential" simply because the Agency has not publicly taken an official position on most of the events discussed and cannot do so at this time in this form. Nevertheless, employees are encouraged to use this factual background information in interviews with applicants and in discussions with interested outsiders. The booklet, however, should not be shown to non-Agency personnel.

This compilation is neither definitive nor all inclusive – in the sense that there is a single way of answering questions about CIA. Officers should enlarge their knowledge of the points covered, as well as other aspects of intelligence, by additional reading and by requesting specific guidance from Headquarters on new questions as they arise. Tact, common sense, and candor are as important as any "authoritative" answer. The booklet is no more than a guide, but it does embody the Agency's determination to take the public's questions seriously and to answer them as straightforwardly as possible.

APPROVED FOR RELEASE

Date 2/11/80

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bers of the immediate family. However, following employment many of these individuals are then free to disclose their Agency affiliation because of the relatively open nature of the positions for which they finally qualify.

An Employee's Private Life

Except for the continuing responsibility to avoid disclosure of information affecting national security, Agency employees are under no formal restrictions beyond those governing the conduct of Federal workers as a whole. As such, they are subject to limitations imposed by the Hatch Act concerning partisan political activity and to statutes governing conflict of interest between the public good and private benefit.

Otherwise, the Agency relies on its employees to exercise good judgment and discretion in the area of private activities, keeping in mind the nature and sensitivity of Agency responsibilities. Counseling and advisory opinions are provided by the Agency to individual employees upon their request.

The Agency does not check up on or conduct surveillance of its employers but does carry out periodic reinvestigations or reevaluations of them for the purpose of revalidating security clearances. Employees are advised when such action is scheduled.

Because the Agency's work is attentive to international developments on a worldwide, around-the-clock basis, emergency situations sometimes requires certain employees to be available for duty in other than their normal working hours.

Professional Memberships and Published Works

Employees are encouraged to maintain or obtain memberships in professional organizations, although not as official representatives of the Agency. Such memberships should not involve serious risk of compromise of classified information.

Large numbers of CIA personnel have published articles, pamphlets, and books, as well as presented papers at scholarly meetings. In some instances, these have no relationship to the work the person performs in the Agency and are not subject to review prior to publication.

In other instances, however, employees publish on subjects in which they specialize as part of their jobs. In such cases, the employee is required to submit his work for review by his supervisor to insure that no classified information is divulged. Once assured that classified information is not compromised, he is then free to publish or present his work, with the understanding that he is speaking for himself and not the Agency.

Leaving the Agency

An employee may terminate his or her employment at any time without interference by the Agency. Typically, at least two weeks' notice is expected but is not obligatory. In instances where resignation takes place overseas, some understanding is reached about transportation costs in the event the resignee is returning to the United States.

The departing employee is responsible for returning all official documents and property entrusted to him and is reminded of his continuing responsibility under law not to divulge information affecting the security interests of the United States.

The Agency has the authority to separate involuntarily any employee who, in the judgment of the Director, has failed to to carry out his duties responsibly and effectively. Such action is not initiated without the most careful review of all factors bearing upon the situation and the employee retains the right to appeal to a special senior grievance committee maintained by the Agency to assure employee rights.

* * * * *

A departing employee's prospects for other employment depend on a number of factors—his personal experience and background, the attitude of prospective employers toward the Agency, and limitations on what may be divulged about the employee's activities with the Agency.

Recognizing the latter problem, the Agency typically assists the departing employee in compiling a personal resume which reflects his experience without compromising sensitive information. In addition, the Agency's wide contacts with other Governmental organizations, academic institutions, and many sectors of society often enable him to establish connections leading to new employment.

In general, former employees seem to do well because of the Agency's reputation for high professionalism in a number of fields, and because of the successful record compiled in many endeavors by those who have departed earlier.

ADMINISTRATIVE—INTERNAL USE ONLY

PERSONNEL HR 20-27

27. SEPARATION BY THE AGENCY. As appropriate under statute, a career employee may be separated from the Agency by action of the Director of Central Intelligence or as delegated in certain circumstances to the Director of Personnel. Following are the various circumstances in which employees may be separated by the Agency:

a. DURING TRIAL PERIOD

(1) The purpose of the three-year trial period is to provide a period of assessment of the employee to determine that continued employment is in the best interests of both the employee and the Agency. Heads of Career Services are responsible for identifying employees under their jurisdiction who do not successfully complete the trial period.

(2) During the first two years of the trial period, involuntary termination of employment may be effected by the Director of Personnel on the recommendation of the Head of the employee's Career Service. During the third year of the trial period, involuntary termination of employment may also be effected by the Director of Personnel; however, the Director of Personnel's decision may be appealed to the Director of Central Intelligence within ten calendar days of the receipt of notification.

(3) A recommendation for either continuation of employment or termination must be included in the narrative part of the employee's Fitness Report for each year of the trial period. Proposals for termination during the trial period will

be by memorandum from the Operating Offical to the Head of the Career Service for recommendation to the Director of Personnel. Recommendations for termination after the second year of the trial period will include an explanation by the Head of the Career Service of the factors that precluded an earlier recommendation for termination. The Director of Personnel will review each case and, if concurrence is indicated, notify the employee of the termination of employment, confirm the reason for separation, and establish the effective date of the action.

b. TERMINATION OF CONTRACT. The conditions governing termination by either party prior to the termination of a contract are governed by the terms of the contract.

c. TERMINATION FOR FAILURE TO MEET THE WORK AND EFFICIENCY REQUIREMENTS OF THE AGENCY. An employee who fails to meet the work and efficiency requirements of the Career Service or fails to perform adequately the duties of the assigned position should be considered for administrative action which may, under the procedures applying, including separation from the Career Service and, possibly, the Agency.

d. TERMINATION FOR FAILURE TO MEET SECURITY OR MEDICAL STANDARDS. The Director of Security and the Director of Medical Services will make appropriate recommendations to the Director of Personnel when an employee does not meet Agency security or medical standards.

e. TERMINATION FOR FAILURE TO MEET STANDARDS OF CONDUCT. The Agency standards of employee conduct are set forth in HR 20-6. Heads of Career Services will ensure that appropriate

officials take or initiate corrective or disciplinary action as necessary. If warranted, Heads of Career Services will forward a recommendation for separation to the Director of Personnel if an employee fails to meet Agency standards of conduct.

f. TERMINATION FOR ABANDONMENT OF POSITION. An employee who abandons a position may be separated without following the usual procedures for involuntary separation. After the employee's failure to report for duty or to return from leave, an effort should be made to determine the employee's intentions. If this cannot be done within ten days, the employee may be separated for abandonment of position. The separation will be effective the last day of active duty or of approved leave, whichever is later. Notice of separation will be mailed to the employee's last known address. If later evidence indicates that the abandonment was not the fault of the employee, the employee will be reinstated and back pay restored.

g. DETERMINATION OF LEGAL INCOMPETENCE. An employee who is declared mentally incompetent by court action and who is not eligible for disability retirement will be separated by the action. "Separation – Legal Incompetence."

h. SEPARATION OF EXCESS PERSONNEL

(1) If an employee is excess to the needs of a component and requests assistance for reassignment, an effort will be made first by the Career Service and then by the Office of Personnel to find suitable employment elsewhere in the Agency. If these efforts fail, the employee may be found excess to the needs of the Agency and separated.

(2) The grounds for finding an employee excess to the needs of a component are:

(a) The component is overstrength overall or in a particular grade or functional element;

(b) There is no longer a requirement for the particular skills or qualifications possessed by the employee; or

(c) A reduction or elimination of the functions of the component thereby requiring a reduction in staff.

i. LOW RANKING—WITH NOTIFICATION—IN TWO CONSECUTIVE YEARS. It is Agency policy to monitor the overall level of employee performance by application of comparative ranking to identify employees whose performance and potential are low in comparison with other employees of the same grade and functional category. The various evaluation panels and boards subordinate to a Career Service will identify employees who rank in the bottom three percent of those being ranked. They will then identify any of these who have, in the judgment of the panel, significant problems (relative to their peers) in performance, attitude affecting performance, or willingness to accept assignment in the interests of the Agency. The names of employees so identified will be sent, along with other pertinent materials, to the Head of the Career Service, who will review the list, making deletions where circumstances do not support further action. After these deletions, the remaining employees on the list will be notified of the low ranking, the reasons for it, the availability of counseling to assist any effort to improve ranking, and the consequences of low ranking in a consecutive year. Upon notification of low ranking in a second consecutive year, the administrative action, depending upon the circumstances of the case, may include counseling, reassignment, downgrading; or separation. If the Head of the Career Service determines that separation

is warranted under this paragraph, the case will be reviewed with the Director of Personnel before initiating separation procedures.

j. OTHER TERMINATION IN THE INTERESTS OF THE AGENCY. In addition to paragraphs a through i, employees may be terminated if the Director of Central Intelligence determines it necessary and advisable in the interest of the Agency or for other reasons contributing to the efficiency of the Agency.

k. RESPONSIBILITIES

(1) HEADS OF CAREER SERVICES. The Heads of the five Career Services are responsible for identifying employees under their jurisdictions who should be considered for separation. They or their designees will review each case with the Director of Personnel or designee and, when appropriate, recommend to the Director of Personnel termination of the individual's employment.

(2) DIRECTOR OF SECURITY. When warranted by the information available, and after notifying the appropriate Head of Career Service, the Director of Security will recommend to the Director of Personnel the termination of the employment of an Agency employee and advise the Director of Personnel of the security factors bearing on the recommended separation. When the Director of Security considers an individual case to be so sensitive that disclosure should initially be made only to the Director of Central Intelligence for determination of the action to be taken, such procedure will be followed.

(3) DIRECTOR OF MEDICAL SERVICES. When findings warrant, the Director of Medical Services will recommend to the Director of Personnel the disability retirement of an employee or the termination of employment on grounds of

medical disqualification. The Director of Medical Services also will advise the Director of Personnel of medical factors bearing on recommended separations.

(4) DIRECTOR OF PERSONNEL. Subject to the consideration set forth in paragraph m, the Director of Personnel will ensure compliance with the procedures established by the regulation and will take appropriate action or recommend action to the Director of Central Intelligence.

l. Not used.

m. PROCEDURES. Normally, separations by the agency will be effected in accordance with the procedures outlined below. They should be followed insofar as practicable, but there may be circumstances of a case that make these procedures impractical or undesirable, and the case should be handled in a manner conforming to the circumstances. Moreover, to meet the responsibilities placed upon the Agency and pursuant to statutory authority, any employees may be separated immediately and without regard to any suggested procedural steps when the Director of Central Intelligence considers it necessary or advisable in the interests of the United States.

(1) A Head of a Career Service or designee who plans to recommend the separation of an employee will first review the case with the Director of Personnel or designee.

(2) Upon recommendation to the Director of Personnel by the Head of the Career Service that an employee be separated, the Director of Personnel or designee will confirm to the employee that such a recommendation has been made and will give the reasons for the action being considered,

as presented by the Career Service. The employee will be offered the opportunity to comment orally or in writing within ten days.

(3) If the Director of Personnel, after review, decides not to recommend termination of the individual's employment, the Head of the Career Service will be consulted as to the appropriate course of action.

(4) If the Director of Personnel concludes that termination of the individual's employment is to be recommended, the employee will be advised in writing and the case forwarded to the Director of Central Intelligence for decision. The employee will be advised that a written appeal of the termination recommendation may be filed with the Director of Central Intelligence within ten days.

(5) After reviewing the recommendation of the Director of Personnel to terminate the employment of an employee, and after consideration of any written appeal, the Director of Central Intelligence may:

(a) Terminate the individual's employment with the Agency, pursuant to section 102(c) of the National Security Act of 1947, as amended, or any other authority that may be appropriate to the particular case. The effective date of termination will not be less than 30 days after the decision by the Director of Central Intelligence.

(b) Disapprove in whole or in part the recommendation of the Director of Personnel.

(6) The Director of Personnel will notify the employee in writing of the decision of the Director of Central Intelligence.

(7) The prior steps required in the separation of excess personnel are as follows:

(a) If the head of a component determines that an individual is excess to the needs of the component, both the Head of the Career Service and the employee will be advised of the fact. If the employee requests, the Career Service will make an effort to place the employee in another component within that Career Service. If this is not possible, the Career Service will declare the employee excess and notify the employee in writing of that fact. The Director of Personnel also will be advised.

(b) When the determination is made that an employee is excess to the personnel requirements of the Career Service, the Head of the Career Service will take into consideration the current and anticipated requirements of the Career Service with respect to such factors as grade and qualifications. The comparative performance of employees also may be a factor in selecting employees to be retained or separated from the Career Service.

(c) When requested by an employee declared excess to the requirements of a Career Service, the Director of Personnel will review the qualifications and background in an effort to place the employee elsewhere in the Agency at the same or different grade.

(d) If this effort is unsuccessful after an interval of time sufficient to explore the possibility of alternative placement, the Director of Personnel will initiate termination following the prescribed procedure detailed in

paragraphs m(1) through (6), including review and possible appeal. After the appropriate review, the Director of Personnel may recommend termination to the Director of Central Intelligence or may request the Head of the Career Service to reconsider the declaration of the employee as excess.

(5) In some other cases, the following modified procedures apply:

(a) In the case of abandonment of position, the procedures of paragraph f are to be followed.

(b) In the case of separation during the trial period, the procedures of paragraph a are to be followed.

(c) Pursuant to statutory authority, the Director of Central Intelligence may separate an employee directly when necessary or advisable in the interests of the United States

n. RESIGNATION IN LIEU OF TERMINATION. An employee whose separation has been recommended may elect to resign at any time before the effective date of separation. If an employee elects to resign after formal action has been initiated but submits a resignation effective at a future date, the Director of Personnel or designee will determine, after consultation with appropriate officials, whether the best interests of the Agency require continuation of procedures to effect involuntary separation at an earlier date.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 82-2016

JOHN DOE, PLAINTIFF,

v.

WILLIAM J. CASEY, DEFENDANT.

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule 1-9(h) of the Rules of the United States District Court for the District Court for the District of Columbia, defendant submits the following statement of material facts as to which no genuine issue exists. Defendant does not at this stage of the proceeding contend that any fact included in plaintiff's statement of material facts is in genuine issue; however, defendant does suggest that the facts proposed by plaintiff, to the extent they differ from this statement, are not material to the proper disposition of the motions for summary judgment.

1. Defendant is the Director of Central Intelligence and the head of the Central Intelligence Agency (CIA), and has served in those capacities since 28 January 1981. (Declaration of William H. Casey, ¶1)

2. Defendant acted in his capacity as Director of Central Intelligence in connection with the termination of John Doe's employment with the CIA on 7 May 1982. (Casey Declaration, ¶¶1, 4)

3. The authority of the Director of Central Intelligence to terminate the employment of CIA personnel is contained in section 102(c) of the National Security Act of 1947, as amended:

> Notwithstanding the provisions of section [7501] of Title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affects the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

(50 U.S.C. § 403(c); Casey Declaration, ¶2)

4. The Central Intelligence Agency regulation concerning the involuntary separation of CIA personnel from the agency is HR 20-27, and, as applicable to this civil action, provides:

> m. PROCEDURES. Normally, separations by the Agency will be effected in accordance with the procedures outlined below. They should be followed insofar as practicable, but there may be circumstances of a case that make these procedures impracticable or undesirable, and the case should be handled in a manner conforming to the circumstances. Moreover, to meet the responsibilities placed upon the Agency and pursuant to statutory authority, any employee may be separated immediately and without regard to any suggested procedural steps when the Director of Central Intelligence considers it necessary or advisable in the interests of the United States. . . .

(Casey Declaration, ¶3)

5. After personal consideration of Mr. Doe's case, defendant determined that the termination of John Doe's employment was necessary and advisable in the interests of the United States and, exercising his discretion under section 102(c) of the National Security Act of 1947, and pursuant to HR 20-27m, he terminated Mr. Doe's employment. (Casey Declaration, ¶4)

Respectfully Submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

/s/ VINCENT M. GARVEY
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/s/ DAVID H. WHITE
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2016

JOHN DOE, PLAINTIFF,

v.

WILLIAM CASEY, DIRECTOR OF CENTRAL INTELLIGENCE,
DEFENDANT.

DECLARATION OF WILLIAM J. CASEY

William J. Casey declares as follows:

1. I am the Director of Central Intelligence and the head of the Central Intelligence Agency (CIA), and I have served in these capacities since 28 January 1981. I acted in these capacities in connection with the termination of John Doe's employment with the CIA on 7 May 1982.

2. The authority of the Director of Central Intelligence to terminate the employment of CIA personnel is contained in section 102(c) of the National Security Act of 1947, as amended (50 U.S.C. 403(c)). That section reads as follows:

> (c) Notwithstanding the provisions of section 652 of Title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

3. HR 20-27 is the CIA regulation which concerns the involuntary separation of CIA personnel from the CIA and which implements the discretionary termination authority of section 102(c) of the National Security Act of 1947, as amended. HR 20-27 provides in pertinent part:

> m. PROCEDURES. Normally, separations by the Agency will be effected in accordance with the procedures outlined below. They should be followed insofar as practicable, *but there may be circumstances of a case that make these procedures impracticable or undesirable, and the case should be handled in a manner conforming to the circumstances. Moreover, to meet the responsibilities placed upon the Agency and pursuant to statutory authority, any employee may be separated immediately and without regard to any suggested procedural steps when the Director of Central Intelligence considers it necessary or advisable in the interests of the United States.* (emphasis added).

4. A recommendation was made to me that the employment of John Doe with the CIA be terminated. I personally reviewed Mr. Doe's case. After careful consideration of the matter, I determined that the termination of Mr. Doe's employment was necessary and advisable in the interests of the United States and, exercising my discretion under the authority granted by section 102(c) of the National Security Act of 1947, as amended, and pursuant to HR 20-27m, I terminated Mr. Doe's employment.

I declare under penalty of perjury that the foregoing is true and correct.

17 September 1982 — Date

/s/ WILLIAM J. CASEY
William J. Casey
Director of Central Intelligence

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2036

DONALD S. JORDAN, PLAINTIFF,

v.

CENTRAL INTELLIGENCE AGENCY AND
ADMIRAL STANSFIELD TURNER, DEFENDANTS

[Filed Sept. 16, 1980]

MEMORANDUM

This case was brought by a former employee of the Central Intelligence Agency against his former employer and the Director of the Central Intelligence Agency, Admiral Stansfield Turner, in his official and individual capacities. Plaintiff alleges that he was discharged in violation of rights secured to him by the first and fifth amendments to the Constitution, by statute, CIA regulations, and the common law of contract.

I

For twenty-six years, plaintiff was employed by the CIA in its Domestic Collection Division "(DCD"). During this period, he served as Deputy Chief of DCD offices in Denver, Seattle, and San Francisco. From 1974 until his dismissal on December 5, 1977, plaintiff served as Resident Officer in San Diego, California.

Plaintiff claims that his discharge from the CIA was due entirely to complaints about personnel practices that he made within the CIA and finally publicly over the years of his employment. On November 1, 1977, plaintiff's name

appeared on a list of employees scheduled to be separated from the CIA on March 31, 1978. On November 15, 1977, in response to the inclusion of his name on the list, plaintiff sent to CIA Director Turner and also made public a telegram reiterating his complaints against certain CIA officials. Three weeks later, three CIA employees came to plaintiff's office and informed him that Director Turner had decided to terminate him immediately on account of the telegram. Thereafter, Director Turner directed the issuance of a press released purporting to explain plaintiff's discharge. Plaintiff claims that the press release was inaccurate, impugned his professional credibility and integrity, and handicapped his opportunity for other employment.

It is undisputed that defendants never afforded plaintiff a hearing or other process. Defendants commendably admitted that incorrect statements concerning plaintiff's discharge were made by a CIA representative to the press. Answer, filed December 20, 1979, at ¶26. Defendants deny, however, that their explanation of the discharge, albeit inaccurate, caused plaintiff any injury.

II.

Defendants' motion for summary judgment is narrowly drawn. The motion does not purport to address the specific reasons for the dismissal of the plaintiff; defendants neither admit nor deny plaintiff's assertion that he was terminated because of his private criticisms of agency policy. Rather, the theme of defendants' motion is that for legal reasons and because of broad and basic concerns for the mission of the CIA, no court should scrutinize the Director's decision to terminate plaintiff's employment. Defendants contend that judicial review of employment decisions is precluded by statute, 50 U.S.C. §403(c). They assert further that the reasons for plaintiff's discharge are

irrelevant to their motion because plaintiff cannot show that interests protected by the first and fifth amendment [*sic*] were affected by the firing.

Upon consideration of defendants' motion, plaintiff's opposition, the oral argument and the record in this case, the Court concludes that the defendants' motion should be granted in part and denied in part. Plaintiff can demonstrate no fifth amendment liberty or property interest that was infringed by the conduct of the defendants. Accordingly, defendants' motion for summary judgment is granted on plaintiff's fifth amendment claims with respect to all defendants, including those sued in an individual capacity.

However, plaintiff is entitled to judicial review of his claim that his firing violated the statute governing termination of CIA employees. The Director's determination to terminate plaintiff's employment pursuant to 50 U.S.C. § 403(c) is subject to review for abuse of discretion. Defendants' motion for summary judgment on this claim must, therefore, be denied. As is more fully developed below, further development of the facts is necessary to determine whether Defendant Turner terminated plaintiff in retaliation for what he said, and, if so, whether such a determination was arbitrary and capricious.

There remains a dispute about facts material to plaintiff's first amendment claim. Accordingly, a further motion for summary judgment or trial is required to determine whether one or more defendants violated plaintiff's rights under the first amendment. The motion for summary judgment with respect to individual liability remains under advisement.

III.

A.

Statutory Cause of Action:

Defendants maintain that the statute which authorizes the Director to terminate a CIA employee precludes

judicial review. That section, 50 U.S.C. § 403(c), provides in pertinent part that:

> Notwithstanding the provisions of section 652 of Title 5 [5 U.S.C. § 7501], or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . .

Section 403(c) clearly vests broad discretion in the Director to terminate CIA employees. *See Torpats* v. *McCone,* 112 U.S. App. D.C. 159, 300 F.2d 914, 915 (per curiam), *cert. denied,* 371 U.S. 886 (1962). But, the existence of such discretion does not itself preclude review. One section of the Administrative Procedure Act does state that "agency action [that] is committed to agency discretion by law" is exempt from judicial review, 5 U.S.C. § 701(a)(2). But another section states that judicial review is accessible in case of an abuse of that discretion. 5 U.S.C. § 706(2)(A). In addition, the Supreme Court has interpreted Section 701(a)(2) narrowly. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971). It has specifically stated, in *Barlow* v. *Collins,* 379 U.S. 159, 166 (1970), that even a statute authorizing the Secretary of Agriculture "to carry out such regulations as he may deem proper" did not preclude judicial review because, as one commentator has written, "the power to prescribe such regulations as the administrator may deem desirable is still subject to the judicially enforceable rule of reason." B. Schwartz, *Administrative Law* at 610 (1976). Accordingly, this Circuit has repeatedly emphasized the narrowness of the statutory exemption from judicial review, *see, e.g., Adams* v. *Richardson,* 480 F.2d 1159, 1161-62 (D.C. Cir. 1973), and has stressed that "[t]he Administrative Procedure Act . . . embodies a broad determination by Congress to subject the decisions of government agencies to review by the

courts." *U.S. Lines* v. *Federal Maritime Commission,* 584 F.2d 519, 525 (D.C. Cir. 1978). Certainly, in a case such as this where the plaintiffs claim that defendants have violated the law in the form of a statutory provision, CIA regulations, and, most important, the Constitution, federal officials such as defendants "cannot have discretion to behave unconstitutionally or outside the scope of [their] delegated authority." *Myers & Myers, Inc.* v. *United States Postal Service,* 527 F.2d 1252, 1261 (2d Cir. 1975). *See also Nguyen Da Yen* v. *Kissinger,* 528 F.2d 1194, 1199 (9th Cir. 1975); *Ralpho* v. *Bell,* 569 F.2d 607, 618-22 (D.C. Cir. 1977); *see generally* K.C. Davis, *Administrative Law of the Seventies* § 28.19 (1980 Supp.).

Moreover, nothing in section 403(c) specifically insulates the Director from review under the terms of the statute for abuse of discretion. This section does state that the Director may terminate employment "[n]otwithstanding the provisions of section 652 of Title 5 [5 U.S.C. § 7501], or the provisions of any other law." But this language does not purport to oust courts of jurisdiction from review; it says nothing about judicial review.[1] Therefore it does not, by its terms, preclude such review, since the Supreme Court has held that " 'clear and convincing evidence' of a contrary legislative intent" is required to restrict access to judicial review of agency action. *Barlow* v. *Collins,* 397 U.S. 159, 167 (1970), *citing Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 141 (1967).

Furthermore, section 403(c) provides a standard for review. It states that CIA employees are terminable at will only if the Director deems that termination is "necessary

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[1] It should be noted that 5 U.S.C. § 7501, referred to in this section, governs only the suspension or termination of federal employees. It does not touch on the question of judicial review. Specific reference to this provision thus further indicates that the language of section 403(c) is not intended to address the issue of judicial review.

or advisable in the interests of the United States." Obviously, a decision by the CIA Director as to what is "necessary or advisable in the interest of the United States" in the context of terminating a CIA employee must be given the greatest deference by reviewing courts. He has an enormous and vital responsibility. He needs the firmest possible control of CIA personnel. Courts called on to review a personnel decision raising constitutional questions obviously should be most circumspect in the discharge of their responsibility. If, for example, any inquiry on the merits of the reasons for dismissal would, by disclosure, impair some important national interest, review might be inappropriate or require special procedures to protect security. *See In re Halkin,* 598 F.2d 176 (D.C. Cir. 1979).

Defendants suggest that the interests of the United States require maximum secrecy about the CIA and that such secrecy could best be preserved by foreclosure of judicial review of agency personnel decisions. But neither the language nor the apparent intent of section 403(c) suggests that Congress intended to protect the secrecy of the CIA at all costs, or intended that the Director be the sole judge of the "interests of the United States" in all CIA personnel cases, even where the Constitution is implicated. The "interest of the United States" include not only national security matters in which the CIA has special responsibility, but also "the interests of the United States" in the defense and protection of its Constitution, an interest of the United States in which its courts have a special responsibility and experience. Nothing cited or argued by defendant establishes that Congress has relieved the courts of that responsibility in respect to a constitutional question relating to termination of a CIA employee. Thus, in light of the presumption in favor of judicial review of agency action, *see Barlow* v. *Collins,* 397 U.S. at 166; *Jaimez-Revolla* v. *Bell,* 598 F.2d 243, 246 (D.C. Cir.

1979), the Court must conclude that Congress did not intend to foreclose judicial review of determinations made pursuant to 403(c). *See Torpats* v. *McCone, supra.*

Should defendants demonstrate that review of the merits and a statement of reasons or explanations may, in this case, contravene the intent of Congress in enacting section 403(c), then further consideration of specific facts and circumstances might be inappropriate. *See Peoples* v. *USDA,* 427 F.2d 561, 566 (D.C. Cir. 1970) (dictum). But in view of the constitutional aspects of plaintiff's contentions, which are, so far, uncontroverted by defendants, and defendants' pointed refusal to specify the reasons for plaintiff's firing or to assert any specific national security interests militating against further review, such a determination cannot now be made; summary judgment on plaintiff's claim for statutory review must be denied.

B.

Fifth Amendment Property Claim:

Plaintiff claims that his termination without due process violated a protected property interest in continued employment. A government employee who has a property interest in his job may not be deprived of it without due process of law. *Perry* v. *Sindermann,* 408 U.S. 593 (1972). Such an entitlement may be found in the statute governing plaintiff's employment, agency regulations, or in mutually understood policies or understandings. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Mazaleski* v. *Treusdell,* 562 F.2d 701, 709 n.23 (D.C. Cir. 1977). But plaintiff can demonstrate no such entitlement.

Plaintiff's claim to a statutory entitlement founders on the plain language of section 403(c). That provision, which bears repeating, provides that

> Notwithstading the provision of . . . any other law, the Director of Central Intelligence may, in his discre-

> tion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interest of the United States.

50 U.S.C. § 403(c). The statute is clear that the Director has discretion to dismiss an employee for reasons having no relation to the employee's behavior or performance. The breadth of the Director's discretion specifically belies any reasonable, bilateral claim to a property interest in continued employment. *See Mazaleski* v *Treusdell,* 562 F.2d at 709 n.23; *Sims* v *Fox,* 505 F.2d 857, 861 (5th Cir. 1974), *cert. denied,* 421 U.S. 1011 (1975).

Similarly, the applicable regulations, Headquarters regulation (HR) 20-28 and 20-27, expressly provide that an employee may be terminated (regardless of his performance) "when the Director of Central Intelligence considers it necessary or advisable in the interests of the United States."

Plaintiff points to two agency documents that arguably support his claim to an entitlement. The first is a booklet providing general information to CIA personnel for use in answering questions of applicants and other outsiders. It provides in pertinent part, that:

> The Agency has the authority to separate involuntarily any employee who, in the judgment of the Director, has failed to carry out his duties responsibly and effectively.

Attachment Z to Jordan Affidavit, January 17, 1980, at 3. A similar booklet, undated but apparently addressed to new CIA employee, states in part that:

> An employee may be separated involuntarily from the Agency if he does not perform his work satisfactorily, fails to qualify for Career Employee status after 3 years of Agency service, violates security measures and regulations, or conducts himself in an unsuitable manner. (Agency regulations specify the rights and the procedures that must be observed in any action taken to involuntarily separate an employee.)

Such handbooks, though not having the force of statute or regulation, may in some circumstances provide the basis for a protected entitlement. *Ashton* v. *Civiletti,* 613 F.2d 923, 929 (D.C. Cir. 1980). Nevertheless, in these circumstances, the assurances given by the booklets do not arouse sufficiently definite expectations to give rise to a property interest.

First, the booklets themselves do not purport to address the full scope of the agency's relations or authority over its employees. Indeed, the booklet identified as Attachment Z specifically disclaims any attempt to be "definitive [or] all inclusive." *See* Attachment Z, *supra,* at 1. Similarly, the document identified as Attachment AA expressly incorporates regulations that on their face indicate that an employee may be dismissed for reasons having no relation to the employee's performance. By contrast, in *Ashton,* the Court of Appeals analyzed an official Handbook for non-investigative employees, which was given to each new employee when he began work. *See* 613 F.2d at 929.

Second, the documents cited by plaintiff while suggestive, are hardly free from ambiguity. They do not purport to outline all the circumstances in which an employee may be terminated, nor exclude others by negative implication. In *Ashton,* the Handbook provision relied upon stated unequivocally that

> You may assume that your position is secure, if you continue to do satisfactory work.

613 F.2d at 929. In view of the clear language of the regulations, no promise of continued employment may be inferred from the documents relied upon by plaintiffs. *See Mazaleski* v. *Treusdell,* 562 F.2d at 709 n.23.[2]

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[2] In view of the facts adduced by defendants tending to show that plaintiff has no property interest in his employment, plaintiff's bare

Fifth Amendment Liberty Claim:

Plaintiff maintains that the circumstances of his discharge so foreclose his opportunities for future employment as to constitute a denial of liberty without due process. An attack by the Government on an individual's reputation may, in some circumstances, constitute a denial of liberty sufficient to justify due process protection. *Board of Regents* v. *Roth,* 408 U.S. at 573; *Mazaleski* v. *Treusdell,* 562 F.2d 711. However, not every infringement on an individual's reputation or employment prospects rises to the level of a constitutional deprivation. To trigger protection of due process, the government action must (a) make some accusation of immorality of dishonesty against the employee, *see Board of Regents,* v. *Roth,* 408 U.S. 573-74; *Wisconsin* v. *Constantineau,* 400 U.S. 433, 436-37 (1971); or, (b) raise some legal or practical obstacle that would "foreclos[e] his freedom to take advantage of other employment opportunities." *Board of Regents* v. *Roth,* 408 U.S. at 573; *Mazaleski* v. *Treusdell,* 562 F.2d at 713.

In this case, there can be no serious allegation that plaintiff's reputation has been seriously stained. It is admitted by defendants that upon dismissing plaintiff, defendant Turner issued a press release that included inaccurate statements about the reason for his discharge, specifically that plaintiff had demanded that two of his superiors be fired. *See* Answer, 26; Affidavit of Donald Jordan, Attachment BB. Yet there has been no showing that this statement accused plaintiff of dishonesty, immorality, or mental instability. Absent such stigma, no liberty interest can be said to be implicated. *See Wisconsin* v. *Constantineau,* 400 U.S. at 436-37. Thus, in *Mazaleski* v. *Treusdell,* where dismissal of a government employee

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allegation that there existed an "understanding" relating to his employment with the agency is not sufficient to defeat a motion for summary judgment. *See* Rule 56(e), Fed. R. Civ. P.

was accompanied by disclosure that one of the grounds for dismissal was "insubordination," the Court of Appeals found no damage of a constitutional stature to plaintiff's reputation. *See* 562 F.2d at 712 & n. 28. This precedent is controlling here.

Nor can it reasonably be said that plaintiff's job opportunities have been foreclosed by his dismissal. Indeed, section 403(c), far from imposing any legal impediment on future employment, actually imposes a duty on other agencies and departments not to allow plaintiff's termination to affect his right to seek or accept employment with them, if he is declared eligible for such employment by the Civil Service Commission. 50 U.S.C. § 403(c). It is uncontroverted that plaintiff's record with the CIA indicates only that he was terminated "pursuant to statutory authority," and that no requests for information relative to plaintiff have been received from prospective employers. Affidavit of Clifford D. May, attached to Defendants' Motion for Summary Judgment, February 13, 1980.

Plaintiff support his allegation that he has been prevented from finding further employment by his own affidavit stating that he has not sought employment because of my belief that the circumstances of my termination, and particularly, the statements by defendant Turner to the media, which he has now admitted are false . . . effectively preclude suitable employment." Affidavit of Donald Jordan, January 17, 1980, at ¶ 35. The Court must make an independent evaluation of whether the circumstances identified by the plaintiff constitute a deprivation of liberty by foreclosing employment opportunities. Although Jordan's dismissal may be a disadvantage or impediment to future employment, it does not foreclose all other employment possibilities to the extent necessary to infringe a constitutional right. *See Board of Regents* v. *Roth,* 408 U.S. at 573; *Mazaleski* v. *Treusdell,* 562 F.2d at 713. The law of

this Circuit requires a substantial showing that future employment opportunities have been destroyed before finding an infringement of a constitutionally-protected liberty interest. There can be no reasonable dispute that the defendants' conduct, including the inaccurate statements by the CIA representative did not rise to this level.[3] While plaintiff has no duty to seek other employment, he would have had a much better claim had he tried in good faith and failed because of inferences drawn by prospective employers from his CIA termination. Where, as here, the fact and circumstances do not give rise to a finding that a protected liberty interest has been infringed, plaintiff cannot conjure one by asserting a "belief" that employment has been precluded.

D.

First Amendment Claim:

Plaintiff claims that he was fired in retaliation for public and private criticisms of agency personnel practices protected by the first amendment. It is established that in certain circumstances, the first amendment guarantees of free speech protect public employees from retaliation for public[4] and private[5] speech.

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[3] Plaintiff alleges that because he was accused, incorrectly, of urging the dismissal of his superiors, a prospective employer could have no confidence in him. However, the telegram that plaintiff publicly released accuses the same superiors of specific acts of misconduct. An employer sensitive to a potentially critical employee would in all likelihood be as reluctant to hire a person who has criticized his former superiors of misconduct as one who called for the dismissal of his superiors. It is difficult to see, therefore, how any additional disability or obstacle was imposed on plaintiff by the inaccurate statements.

[4] *See* Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977).

[5] *See* Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Hanson v. Hoffman, No. 78-1436 (D.C. Cir. February 7, 1980).

In their motion for summary judgment, defendants focus only on the publicly released telegram. They do not admit, but neither do they dispute, that plaintiff's private remarks affected their decision. The Court assumes, for the purpose of this motion, that plaintiff's private criticisms were protected by the first amendment. In support of their motion. defendants assert *first* that the telegram was not protected speech because of the nature of its contents and the circumstances of plaintiff's employment, *see generally Snepp* v. *U.S.*, 48 U.S.L.W. 3527 (February 19, 1980) (per curiam); and, second, that the public release of the telegram was sufficient to justify plaintiff's termination. Accordingly, they argue, neither the character of plaintiff's private speech nor the actual reason for his discharge are relevant. Indeed, defendants have conceded (for the purpose of this motion only) that plaintiff's private criticisms were the cause-in-fact of the decision to terminate him. They argue, however, that because his discharge would have been justified on the basis of the assertedly unprotected telegram, plaintiff cannot claim a violation of constitutionally protected interests.

Defendants' syllogism rests upon an extreme interpretation of the rule of causation laid down by the Supreme Court in *Mt. Healthy* and elaborated in *Givhan*. In *Mt. Healthy*, the Court rejected the view that a public employee must be reinstated whenever constitutionally protected conduct plays a "substantial" part in the decision to fire him. 429 U.S. at 285. Instead, the Court held that once an employee has shown that his protected conduct played a "substantial" role in the decision to fire him, the employer is permitted to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." 429 U.S. at 287; *see also Givhan* v. *Western Line Consolidated School District*, 439 U.S. at 697; Note, *Free Speech and Imper-*

missible Motive in the Dismissal of Public Employees, 89 Yale L.J. 376, 383-84 (1980).

Defendants interpret the *Mt. Healthy* test to require only that they show that a firing for reasons other than protected speech was *justified*, not that they would *in fact* have fired the plaintiff irrespective of his protected speech. Although this distinction is subtle, it is crucial in these circumstances. If defendants are correct, they need never articulate the actual reasons for firing plaintiff or prove that they would have fired him, but need only point to a sufficient cause to fire him. This interpretation is in error.

To begin with, if defendants are correct, the Court in *Mt. Healthy* would necessarily have reached a contrary result. The plaintiff there lacked tenure and there was not even a state law requirement of cause or reason before a decision could be made not to continue his employment. *See* 429 U.S. at 285. Justification or authority to fire the plaintiff was thus always present. Accordingly, if the Supreme Court intended that the employer need only show a basis for dismissal, rather than what the employer would have done, a remand would not have been necessary, since it could only have been for the purpose of inquiring into what the employer would in fact have done but for the protected conduct. *See* 429 U.S. at 576.

This interpretation was confirmed in *Givhan*. There in stating the nature of the failure of proof in the trial court, the Supreme Court quoted with approval the opinion of the Court of Appeals, which concluded:

> The [trial] court did not make an express finding as to whether the same decision would have been made, but on this record the [respondents] do not, and seriously cannot, argue that the same decision would have been made without regard to the [protected speech]. Appellants seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made. . . . Therefore [respondents] failed to make a successful "same decision anyway" defense.

555 F.2d at 1315, *quoted at* 99 S. Ct. at 693.

This interpretation is consistent with the purpose of the "but for" test of *Mt. Healthy*. The Supreme Court there rejected a rule requiring reinstatement whenever protected speech was found to be a substantial cause of a termination because such a rule "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 429 U.S. at 285. In adding the "but for" test, the Court expressed its concern that a substantial cause rule alone could create an incentive for a marginal or substandard employee to engage in protected speech in order to secure his position. *See* 429 U.S. at 268; Note, *supra*, 89 Yale L.J. at 385-86. The interpretation proposed by the defendants would reach far beyond this purpose of avoiding plaintiff windfalls to create an incentive for the employer to trump up hypothetical justifications for discharge that did not or would not have caused him to fire an employee but for the exercise of protected rights of speech. There is nothing in *Mt. Healthy* that would support such an extreme view.

At oral argument, defendants suggested that however *Mt. Healthy* is interpreted generally, a special exception should be made for CIA employees because of the national security concerns inherent in judicial review of CIA personnel decisions. According to the defendants, the requirement that they show by a preponderance of the evidence that they would have discharged the plaintiff but for his protected speech would expose them in the future to what they termed "greymail"—this is, the agency might be coerced to retain an employee who had engaged in protected speech merely to avoid stating the actual reasons for his discharge, which might involve sensitive security issues.

Defendants have not, however, demonstrated that the risk of "greymail" cannot be minimized by the devices such as the assertion of executive privilege, *see United States* v. *Reynolds,* 345 U.S. 1 (1952), *in camera* review, protective orders, or similar procedures carefully tailored to the particular circumstances.[6] Nothing in the record here or in relevant court decisions supports a conclusion that the interests of the CIA in maximizing the secrecy of its operations require the plaintiff to forego all first amendments rights guaranteed other public employees. To permit the *Mt. Healthy* burden to be carried by a determination that an alternative justification for dismissal exists—where the Director has almost complete discretion to find such a justification[7]—would have that effect. If such an exception to *Mt. Healthy* is to be fashioned in aid of CIA secrecy, it should be created on the basis of a fuller record than has been developed here.

Accordingly, summary judgment at this stage is not appropriate. Viewing the facts in the light most favorable to the plaintiff, who is not the moving party, it is assumed for the purposes of this motion that the private criticisms voiced by the defendant were protected by the first amendment. Defendants' silence on why plaintiff was dismissed,

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[6] Indeed, has plaintiff sought the employment records relating to his dismissal pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, the CIA would not be permitted to urge a blanket exemption from compliance. Rather, the CIA would be required to submit an affidavit detailing the basis of a claim of exemption. Only upon a showing that disclosure in that specific case would lead to the unauthorized disclosure of intelligence sources would an exemption be granted. *Phillipi* v. *Central Intelligence Agency,* 546 F.2d 1009 (D.C. Cir. 1976). Plaintiff does not contest that an affidavit addressed to the circumstances of the particular case would be sufficient to avoid disclosure of documents that the CIA determines to be sensitive. *See Weissman* v. *Central Intelligence Agency,* 565 F.2d 692 (D.C. Cir. 1977).

[7] See the discussion of 50 U.S.C. § 403(c), *supra.*

or whether he *would* have been dismised but for this speech prevents them from carrying their burden of showing, by a preponderance of the evidence, that plaintiff would not have been fired but for his protected conduct.[8] *See Mt. Healthy City School District* v. *Doyle,* 429 U.S. at 287.

Nor will the Court at this time rule on whether plaintiff's private criticisms or public telegram were protected by the first amendment. Such a determination raises difficult issues of fact relating to the circumstances of the speech, the nature of plaintiff's employment, and the employer's need for secrecy, etc. *See Hanson* v. *Hoffman, supra,* slip op. at 18. These issues cannot be addressed on the scanty record now before the Court. *See Hanson* v. *Hoffman, supra,* slip op. at 19; *Avrech* v. *Secretary of Navy,* 520 F.2d 100, 105 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 970 (1976); *Ring* v. *Schlesinger,* 502 F.2d 479, 489-90 (D.C. Cir. 1974). In declining to rule at this stage, the Court does not intend to foreclose the possibility that by carefully drawn, unambiguous agreements between the agency and its employees, an employee may waive first amendment protection for public and private statements about the CIA. *See Snepp* v *United States, supra.* Whether the present agreement between plaintiff and the CIA will have this effect remains to be determined.

In order to limit the scope of the Court's inquiry into internal CIA affairs, and to limit also the breadth of this Court's constitutional determinations, the next step in

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[8] At oral argument on defendants' motion, the Court offered defendants an opportunity to articulate the actual reasons for plaintiff's dismissal. By Memorandum to the Court, March 17, 1980, defendants declined to state any reasons. Accordingly, substantial doubts about the reasons for and motive behind plaintiff's dismissal remain. Whether the issues raised here can be resolved by further affidavit by defendant Turner remains to be determined. *See Mazeleski* v. *Treusdell,* 562 F.2d at 717.

adjudication of this matter will deal with whether plaintiff would have been discharged but for his private speech. If so, then the Court's inquiry will be limited to whether the publicly released telegram was speech protected by the first amendment. If not, then the status of the telegram need not be addressed and the inquiry limited to the status of plaintiff's private criticisms.

IV.

It remains to be determined whether defendant Turner may be personally liable to plaintiff for the alleged violations of his constitutional rights. Since the decision of the Supreme Court in *Davis* v. *Passman*, 99 S. Ct. 2264 (1979), and the earlier decision of our Court of Appeals in *Dellums* v. *Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977) there can be no doubt that a private right of action against a public official can be implied for a violation of rights secured by the first amendment. *Harper* v. *Blumenthal*, 478 F. Supp. 176 (D.D.C. 1979). In view of the fact that this Court has found that plaintiff has suffered no infringement of rights guaranteed by the fifth amendment, defendant Turner is entitled to partial summary judgment on the claims arising from these alleged instrusions.

Defendant Turner suggests, however, that even if a cause of action lies under the first amendment, he is entitled to absolute immunity for acts committed in the course of his official responsibilities. The Supreme Court has recently made clear that absolute, rather than qualified, immunity is available only in very narrow circumstances; an official "must bear the burden of showing that public policy requires an exemption of that scope." *Butz* v. *Economou*, 438 U.S. 478, 506 (1978). In recognizing absolute immunity for judges, prosecutors, and officers having related functions, the court indicated that officials can claim absolute immunity only when it is "essential for the conduct of the public business." 438 U.S. at 507.

Defendant Turner suggests that such exceptional circumstances are present here, because the Director of the CIA will often be unable to defend an action against himself without resort to classified information. At the same time, the defendants have acknowledged that this case involves no such issue of secrecy or security. Where defense of a constitutional tort action requires the disclosure of classified information, absolute immunity may be proper. That question, however, must be left to the appropriate case; the possibility of such a dilemma does not satisfy the high standard set forth in *Butz* v. *Economou* for the grant of absolute immunity in all circumstances.[9]

Because of the nature of the test for qualified immunity, the issue of whether defendant Turner is immune from liability cannot now be resolved. To satisfy the standard of qualified immunity, an official must demonstrate both that he had a good faith belief in the propriety of his actions, *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974), and that the action was objectively reasonable in light of information available at the time of a decision. *Wood* v. *Strickland*, 420 U.S. 308, 320-322 (1975).

Butz v. *Economou* counsels that such determinations should be made, where possible, at summary judgment. Here, however, summary judgment is not appropriate at this time. Defendants have conceded that a CIA representative made inaccurate statements about the reasons for plaintiff's dismissal at the time he was discharged. If defendant Turner had a role in such inaccurate statements,

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[9] An additional factor to be weighed in considering whether absolute immunity is appropriate is the availability of administrative remedies. *See Butz* v. *Economou*, 99 S. Ct. at 2914-15. CIA regulations permit discharge without any hearings.

this, alone, may raise a question about possible reprisal for exercise of first amendment rights, requiring further development of the underlying facts. Moreover, defendants have pointedly refused even to specify the reasons for plaintiff's discharge. Where such pivotal facts remain in dispute, summary judgment is at least premature. *Harper* v. *Blumenthal,* 478 F. Supp. at 184. It may be that further proceedings will determine that there is no claim on the merits, in which event the question of Director Turner's personal liability will become moot. If not, there would remain for consideration the extent and nature of his personal responsibility for the inaccurate statements and the alleged violation of plaintiff's first amendment rights. In light of *Butz* v. *Economou,* Admiral Turner will be afforded a further opportunity to deal with his individual liability in a summary judgment mode.

V.

Both the question of statutory review pursuant to 50 U.S.C. § 403(c) and the scope of constitutional review under the first amendment raise difficult and unsettled questions of law. The resolution of these issues in plaintiff's favor raises the prospect of trial on the merits and the corollary possibility of claims of privilege by the defendants arising out the CIA's needs for protecting the secrecy of its operation. Before the Court and the parties embark on such a course, defendants ought to have an opportunity for appellate review pursuant to 28 U.S.C. § 1292(b). Accordingly, by accompanying order, the Court will schedule a conference to afford the parties an opportunity to request that the questions of review under

the first and fifth amendments and section 403(c) be certified for interlocutory appellate review, or proceed to final disposition.

/s/ LOUIS F. OBERDORFER

United States District Judge

Date: Sept. 16, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-2036

DONALD S. JORDAN, PLAINTIFF,

v.

CENTRAL INTELLIGENCE AGENCY, ET AL., DEFENDANTS.

[Filed Nov. 2, 1982]

ORDER

Upon consideration of the parties' agreement to settle this action, the terms of that agreement, and the entire record herein, it is by the Court this 1st day of November, 1982

ORDERED that all orders, opinions, memoranda and decisions heretofore entered by the Court in this action, with the exception of any orders relating to the settlement and dismissal of this action, be and hereby are VACATED.

/s/ LOUIS F. OBERDORFER
Louis F. Oberdorfer
United States District Judge

In the Supreme Court of the United States

No. 86-1294

WILLIAM H. WEBSTER,
DIRECTOR OF CENTRAL INTELLIGENCE, PETITIONER

v.

JOHN DOE

ORDER ALLOWING CERTIORARI. *Filed June 8, 1987.*

The petition herein filed for a writ of certiorari to the *United States Court of Appeals for the District of Columbia Circuit* is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1987 – 181-483/40514

PETITIONER'S

BRIEF

(6)

No. 86-1294

Supreme Court, U.S.
FILED
AUG 22 1987
SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. WEBSTER,
DIRECTOR OF CENTRAL INTELLIGENCE, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the decision of the Director of Central Intelligence to discharge an officer or employee of the Central Intelligence Agency pursuant to the Director's authority under Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), is judicially reviewable under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701-706.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1294

WILLIAM H. WEBSTER,
DIRECTOR OF CENTRAL INTELLIGENCE, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 796 F.2d 1508. The opinion of the district court (Pet. App. 59a-78a) is reported at 601 F. Supp. 581.

JURISDICTION

The judgment of the court of appeals (Pet. App. 79a-80a) was entered on August 1, 1986. A petition for re-

hearing was denied on October 9, 1986 (Pet. App. 81a). On December 31, 1986, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 6, 1987. The petition was filed on that date and was granted on June 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 102(c) of the National Security Act of 1947, ch. 343, 61 Stat. 498, as originally enacted, provided as follows:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

50 U.S.C. 403(c) currently provides as follows:

> Notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the Director of the Office of Personnel Management.

2. The Administrative Procedure Act, 5 U.S.C. 701, provides, in pertinent part, as follows:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

STATEMENT

1. This case stems from a decision by the Director of Central Intelligence to discharge an employee, respondent John Doe,[1] after his nine-year career with the Central Intelligence Agency (CIA or Agency).[2] Respondent began work as a clerk-typist, but he was eventually promoted, after training, to a covert position as an electronics technician. Periodic fitness reports consistently rated respondent as an excellent or an outstanding employee, and the CIA had not expressed dissatisfaction with respondent's work or loyalty. Pet. App. 3a.

On January 28, 1982, respondent voluntarily informed an Agency security officer that he was a homosexual. As a result, the CIA placed respondent on paid administrative leave beginning on February 2, 1982, pending an investigation. On February 12 and 17, respondent was interviewed at length by a polygraph officer about his homosexuality and his risk to security. The officer later informed respondent that his test responses were truth-

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[1] Respondent has at all times proceeded under a pseudonym because his status as a CIA employee cannot be publicly acknowledged (J.A. 5-6).

[2] At this stage of the case, the facts are undisputed. The Agency did not contest respondent's factual assertions. Instead, the Agency stated only that respondent's assertions were not material insofar as they were inconsistent with the Agency's own statement of material facts not in dispute (J.A. 52).

ful, including his statement that he had not had sexual relations with foreign nationals and that he had not disclosed classified information to any sexual partners. Pet. App. 3a-4a.

The polygraph officer prepared a factual report based on the interviews. Respondent was allowed to review the report, and he prepared a supplement. On April 14, a CIA security officer informed respondent that the Agency's Office of Security had determined that the circumstances of his homosexuality posed a security threat, but refused to elaborate. Respondent maintained that he had received conflicting explanations about the Agency's policy towards homosexuals. Two security officers had told respondent that his homosexual activities violated Agency regulations, but the then-CIA Deputy General Counsel told respondent's attorney that homosexuality was a security concern that did not inevitably result in dismissal and was evaluated on a case-by-case basis. Pet. App. 4a.

On April 14, respondent was asked to resign, but he refused. The Office of Security ultimately recommended to the Director that respondent be dismissed. After reviewing respondent's case, the Director concluded that it was "'necessary and advisable in the interests of the United States'" to dismiss respondent from the Agency (J.A. 37). Other Agency personnel told respondent that the CIA would give him a positive recommendation to any prospective employer. Respondent was also informed that if he applied for a job requiring security clearance, the Agency would inform the prospective employer that he had been dismissed because his homosexuality posed a security threat. A member of the General Counsel's staff also informed respondent that he was required to inform the Agency if he applied for a job requiring a security clearance. Pet. App. 5a-6a.

2. Respondent sued the Director in the United States District Court for the District of Columbia. Respondent

alleged that he was dismissed because of his homosexuality and that his discharge violated the First, Fourth, Fifth, and Ninth Amendments; the Administrative Procedure Act (APA), 5 U.S.C. (Supp. III) 702; 28 U.S.C. 1361; and Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c) (J.A. 5, 12-13). Respondent sought a declaratory judgment that his dismissal was unlawful and an injunction requiring the CIA to reinstate him to his former position (*id.* at 13). In the alternative, he sought reinstatement to administrative leave, reconsideration of his security suitability for employment with the Agency, and a variety of procedural rights, such as a statement of the reasons for any future dismissal and an opportunity to contest any adverse final determination (*ibid.*).

Petitioner moved to dismiss respondent's complaint on the ground that Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), precluded judicial review of petitioner's decision under the APA, 5 U.S.C. (& Supp. III) 701-706. The district court denied petitioner's motion (Pet. App. 74a-77a) and granted respondent's motion for summary judgment in part (*id.* at 59a-78a). The court ruled that respondent had been unlawfully discharged because the CIA did not follow its own regulations (*id.* at 70a-74a). The court did not address respondent's substantive constitutional claims (*id.* at 77a).

3. a. By a divided vote, the court of appeals vacated the district court's judgment and remanded the case for further proceedings (Pet. App. 1a-32a). At the outset, the court ruled that Section 102(c) of the National Security Act of 1947 did not "preclude judicial review" under 5 U.S.C. 701(a)(1) of the Director's decision to dismiss an employee (Pet. App. 9a-14a). The majority found nothing in the text or legislative history of Section 102(c) expressly precluding judicial review, and it noted "most importantly" that Section 102(c) provides a stand-

ard governing the Director's decision and the courts' review—*i.e.*, whether dismissal is "necessary or advisable in the interests of the United States" (Pet. App. 12a). The court found that no statutory "framework" or "scheme" would be disrupted by judicial review of the Director's decision to dismiss a CIA employee (*ibid.*), and it concluded that, while Congress had intended to impose a different and more relaxed standard of review than the one governing most federal employees,[3] Congress did not intend to bar review altogether (*id.* at 13a).

The court also held that Section 102(c) did not "commi[t] to agency discretion" under 5 U.S.C. 701(a)(2) the decision whether to dismiss a CIA employee (Pet. App. 15a-19a). The statutory standard did not offer "'absolutely no guidance'" how the Director may exercise his discretion, the court explained, and the statute undoubtedly prohibited discharge for an invalid reason, such as race or hair color (*id.* at 16a). In addition, the court ruled that "we must at least satisfy ourselves" that an employee's removal "has *some* relationship to the interests of the United States" to ensure that the Director did not base his decision on an impermissible factor (*id.* at 17a (emphasis in original)).

On the merits of respondent's claims, the court determined that the Agency did not violate its regulations in dismissing respondent (Pet. App. 19a-23a). Noting that the language of Section 102(c) left "the decision to terminate * * * largely to the expertise and judgment of the Director" (Pet. App. 24a), the court held that its review should be under an arbitrary and capricious standard.

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[3] The court noted the reference in Section 102(c) to 5 U.S.C. 7501—the statutory protections afforded most federal employees, —which allow termination "only for such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)) (Pet. App. 13a).

Looking to the actions taken in this case (*id.* at 23a-32a), the court stated that there were three possible explanations for the Director's decision: First, the Director may have intended to invoke Section 102(c) without giving any reasons at all for discharging respondent. Second, the Director may have intended to discharge respondent as part of a ban against employing homosexuals. And third, the Director may have discharged respondent because *his* homosexuality presented a security risk (Pet. App. 25a). The court found that the first and last of these explanations did not justify further judicial review,[4] but it ruled that the second possible explanation—that respondent was discharged because of a CIA policy against employing homosexuals—gave rise to an arguable claim that respondent's discharge was unlawful (*id.* at 27a).[5] The court did not decide which explanation was

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[4] The court found it "unlikely" that respondent was discharged for reasons having nothing to do with his homosexuality (Pet. App. 25a), but ruled if the district court found that to be true and "the Director intended to invoke section 102(c) without reasons in this case," respondent could not challenge the Director's decision to dismiss him (Pet. App. 26a).

In addition, if the district court found that respondent was dismissed because *his* homosexuality posed a security risk, the court explained, respondent would have an arguable claim that the Agency had unlawfully deprived him of a liberty interest in past or future employment by damaging his reputation. Such action required that he receive an opportunity "to refute the charges and 'clear his name'" (Pet. App. 31a (footnote omitted)). In that event, however, respondent's challenge to his dismissal would not succeed, because the CIA had provided him with all the process that was due by giving him a meaningful opportunity to challenge any allegation that his homosexuality posed a security risk (*id.* at 31a-32a).

[5] If the district court found that to be true, the court explained, respondent would have an *"arguable"* constitutional claim, because *Bowers* v. *Hardwick*, No. 85-140 (June 30, 1986), and *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984), did not address discrim-

correct, and it remanded the case to the district court for further proceedings (*id.* at 32a).[6]

b. Judge Buckley dissented from the majority's ruling that the Director's decision to dismiss a CIA employee was subject to review under the APA (Pet. App. 34a-55a).[7] Looking to both the language and the legislative history, he found a clear intention to preclude review under 5 U.S.C. 701(a)(1) (Pet. App. 35a-45a). Congress's obvious purpose in exempting the Director of the CIA from normal civil service requirements, he concluded, was to allow him "unimpeded" control over personnel as a "natural and necessary function of the extraordinary sensitivity that surrounds every aspect of our national security operations" (*id.* at 43a-44a). Similarly, Judge Buckley found that Section 102(c) committed to the Director's discretion under 5 U.S.C. 701(a)(2) the decision whether to dismiss a CIA officer or employee, a judgment that the courts are ill-equipped to second-guess (Pet. App. 46a-52a). Finally, Judge Buckley also took issue (*id.* at 52a-54a) with the suggestion that the Director's judgment would be subject to scrutiny for arguable constitutional violations, because judicial review even in those circumstances might undercut the Director's ability to carry out his sensitive duties according to his fuller knowledge of the " 'harsh realities of the present

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ination on the basis of homosexual orientation, rather than homosexual conduct (Pet. App. 27a (emphasis in original)). In any event, the Director would have to justify why such a policy was " 'necessary or advisable in the interests of the United States' " (*ibid.*).

[6] Judge Ginsburg joined the majority opinion but also wrote a brief separate concurrence (Pet. App. 33a).

[7] Judge Buckley concurred in the majority's ruling that the CIA did not violate its own regulations in discharging respondent and that respondent had not been deprived of a liberty interest without due process (Pet. App. 34a).

day' " (*id.* at 53a (citation omitted)). The only role for a court, he said, was to determine whether the Director in fact exercised his statutory authority, and the Director's statement that he "determined that the termination of Mr. Doe's employment was necessary and advisable in the interests of the United States" satisfied that requirement (*id.* at 54a-55a).

SUMMARY OF ARGUMENT

I. Section 102(c) of the National Security Act of 1947 commits to the discretion of the Director of Central Intelligence the decision whether to discharge a CIA officer or employee, and it precludes review under the Administrative Procedure Act of that decision. The text of Section 102(c) expressly grants the Director broad discretion to remove a CIA employee. The historical context in which the statute arose shows that, by granting the Director such discretion over federal employees, Congress intended that his decision would be final. Section 102(c) is also an essential component of a broader regulatory scheme that enables the CIA to protect its intelligence activities. Finally, that statute is one component of a general network of statutes that authorize the Secretary of Defense and the heads of other federal agencies summarily to suspend or remove an employee whenever national security considerations demand that result.

II. Respondent cannot rely on the general federal question jurisdictional provision, 28 U.S.C. 1331, to obtain his reinstatement with the CIA. The 1976 amendments to the APA established a comprehensive remedial scheme to resolve questions of sovereign immunity when the actions of federal officials are challenged. Integral to that scheme is a compromise: the APA waives sovereign immunity when a party seeks relief other than money damages, but does not allow an action to go forward where review is precluded by other statutes, such as Section 102(c). A

party such as respondent therefore cannot evade the restrictions imposed by statutes such as Section 102(c) by relying on 28 U.S.C. 1331, because doing so would undermine the compromise embodied in the 1976 APA amendments.

III. Congress may preclude the courts from awarding reinstatement to a discharged employee of an intelligence agency in order to protect the integrity and confidentiality of the agency's activities. The government has a surpassing interest in the successful execution of national security policy and in safeguarding both the fact and the appearance of confidentiality in our intelligence services. In view of the primary responsibility of the President for the implementation of foreign policy and the conduct of intelligence gathering activities, it is reasonable that an Executive Branch official be given final authority over retention or dismissal of persons in sensitive intelligence-related positions. Moreover, it is well-established that the need to protect national security information and intelligence gathering processes can justify limitations on the rights of employees engaged in those activities, including the availability of judicial remedies. Under the state secrets privilege, for example, a plaintiff is prevented from obtaining relief, even for a constitutional claim, when the suit would force the government to reveal matters damaging to national security. Section 102(c) has a similar effect, but it leaves the decision to the Director, rather than to the courts. Section 102(c) does not forbid a removed CIA employee from holding other federal employment and is therefore narrowly tailored to serve the government's compelling interest in safeguarding the integrity of the intelligence establishment.

ARGUMENT

I. THE DECISION OF THE DIRECTOR OF CENTRAL INTELLIGENCE TO DISCHARGE AN OFFICER OR EMPLOYEE OF THE CENTRAL INTELLIGENCE AGENCY IS NOT SUBJECT TO REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

A. Section 102(c) Both Commits To Agency Discretion And Precludes Judicial Review Of The Director's Decision To Dismiss An Officer Or Employee Of The CIA

The Administrative Procedure Act, which provides aggrieved parties with a cause of action against a federal agency for actions that are beyond its statutory authority or that are unconstitutional, 5 U.S.C. 706(2)(B) and (C), does not apply where another statute precludes review or where an agency's action is committed to its discretion by law, 5 U.S.C. 701(a)(1) and (2). Both of those exceptions are applicable here. Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), precludes review of the decision of the Director of Central Intelligence to remove an officer or employee of the CIA, and it commits that action to the Director's discretion.

1. *The statutory text.* The text of Section 102(c) states that "[n]otwithstanding * * * any other law," the Director "may, in his discretion," remove any officer or employee of the CIA "whenever he shall deem such termination necessary or advisable in the interests of the United States." This section, which was enacted only a year after the APA, expressly grants the Director broad discretion to remove an employee whenever he deems it ncessary or advisable in the national interest.

The historical context in which Section 102(c) was enacted shows that the Director's decision is also final. In 1947, federal employees could not obtain judicial re-

view of their removal.[8] The two primary statutes protecting federal employees were the Lloyd-LaFollette Act, 5 U.S.C. (1940 ed.) 652 (superseded by the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. III) 7501 *et seq.*), and the Veterans Preference Act of 1944, 5 U.S.C. (1946 ed.) 863. Under the former statute, nonprobationary employees in the competitive civil service could be removed only "for such cause as will promote the efficiency of [the] service," and they were entitled to notice, a copy of any charges, and a written statement of reasons for their removal. 5 U.S.C. (1940 ed.) 652 (current version at 5 U.S.C. 7513). Under the latter act, veterans also had a right to appeal their discharge to the Civil Service Commission. 5 U.S.C. (1946 ed.) 863. Neither statute authorized judicial review. By providing that the authority vested in the Director was not limited by these or any other laws, Section 102(c) abolished these limited restrictions on the removal power,[9] and thus made even

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[8] See, e.g., *White* v. *Berry*, 171 U.S. 366, 377-378 (1898) (judicial review unavailable in an action for reinstatement); *Keim* v. *United States*, 177 U.S. 290, 292-294 (1900) (judicial review unavailable in an action for damages); *Eberlein* v. *United States*, 257 U.S. 82, 84 (1921); *Bailey* v. *Richardson*, 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally-divided court, 341 U.S. 918 (1951); *Carter* v. *Forrestal*, 175 F.2d 364, 365 (D.C. Cir.), cert. denied, 338 U.S. 832 (1949) (collecting cases); see generally Chaturvedit, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 Nw. U.L. Rev. 287, 307-330 (1968). The oft-stated reason was that this broad power of removal was incident to the power of appointment (U.S. Const. Art. II, § 2), and the latter was essential to the Executive's duty to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, § 3). *E.g.*, *Myers* v. *United States*, 272 U.S. 52, 117 (1926); *Keim* v. *United States*, 177 U.S. at 293; *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

[9] It is clear from the Civil Service Reform Act (CSRA), as well, that the Director's discretion is not limited by the protections of that statute. See 5 U.S.C. 2302(a)(2)(C)(ii) (exempting the CIA from Chapter 23), 2305 (the CSRA does not "impair" the Director's authority under Section 102(c)), 4301(1)(C)(ii) (exempting the CIA from Chapter 43 regarding dismissal for unacceptable performance); H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 127-128 (1978); S. Conf. Rep. 95-1272, 95th Cong., 2d Sess. 127-128 (1978); S. Rep. 95-969, 95th Cong., 2d Sess. 41 (1978); *Neely* v. *United States*, No. 80-2266 (D.C. Cir. Nov. 24, 1986), slip op. 4 (footnote omitted) ("an employee discharged under section 102(c) of the National Security Act has no recourse to the procedures set forth in section 7513 of Title 5"), petition for cert. pending, No. 86-6716; *Department of the Navy* v. *Egan*, 802 F.2d 1563, 1567 n.2 (Fed. Cir. 1986), cert. granted, No. 86-1552 (May 26, 1987) (Section 102(c) is not limited by the CSRA); see also 50 U.S.C. 403(c) (exempting the Director's removal decisions from 5 U.S.C. 7513). Compare *Padula* v. *Webster*, No. 86-5053 (D.C. Cir. June 26, 1987), slip op. 6 & n.3.

We argued in *United States* v. *Fausto*, cert. granted, No. 86-595 (Jan. 12, 1987) (a copy of our brief has been furnished to respondent's counsel), that the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. III) 7501 *et seq.*, is a comprehensive regulation of the procedures to be followed in adverse personnel actions involving federal employees and that the structure and provisions of the CSRA demonstrate that Congress intended to deny federal employees any other remedy that could be maintained under more general statutes. Our argument in *Fausto* applies with equal force here: it would be anomalous to afford respondent greater rights than an employee such as Fausto when Congress has expressly provided that CIA personnel are exempt from the CSRA.

[10] For example, in adopting a 1983 intelligence authorization act amendment, 50 U.S.C. (Supp. III) 403f(f), Congress noted that its

clearer that judicial review was unavailable as to such actions.

Congress has interpreted the act as granting the Director the final say whether to dismiss a CIA employee. See H.R. Rep. 2120, 87th Cong., 2d Sess. 4 (1962); H.R. Rep. 108, 88th Cong., 1st Sess. 4 (1963); S. Rep. 926, 88th Cong., 2d Sess. 2 (1964); S. Rep. 98-77, 98th Cong., 1st Sess. 7 (1983); S. Rep. 98-481, 98th Cong., 2d Sess. 9 (1984); pages 24-25 note 21, *infra*.[10] Both this

Court and the lower federal courts have also interpreted similar measures in that manner. For example, in *Service* v. *Dulles*, 235 F.2d 215 (D.C. Cir. 1956), rev'd on other grounds, 354 U.S. 363 (1957), the District of Columbia Circuit construed a grant of authority to the Secretary of State that is almost identical to Section 102(c).[11] The court there held that, when an employee challenges his dismissal under such a statute, a court is "limited to determining whether any procedural requirement of the statute was violated in [the employee's] discharge" (235 F.2d at 218 (original quotation marks omitted)). Once the court found that the Secretary had satisfied the one procedural requirement imposed by the act—*i.e.*, that the Secretary determine that the discharge was "in the interests of the United States"—judicial review came to an end (*ibid.*).[12]

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language "is similar to the language conferring special termination authority upon the Director under subsection 102(c) of the National Security Act of 1947 (50 U.S.C. 403(c)). The courts have uniformly held that such language confers upon the Director authority to be exercised in his exclusive discretion, and that the exercise of such authority is not subject to review, judicially or otherwise." S. Rep. 98-77, 98th Cong., 1st Sess. 6-7 (1983).

[11] The Department of State Appropriation Act, 1952, ch. 533, § 103, 65 Stat. 581 (expired at the close of fiscal year 1952). See Pet. App. 41a-42a (quoting act).

[12] In *Ludecke* v. *Watkins*, 335 U.S. 160 (1948), the President, pursuant to his authority under the Alien Enemies Act of 1798, ch. 58, 1 Stat. 570, had promulgated a regulation directing the removal from the United States of alien enemies " 'who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States' " (335 U.S. at 163 (citation omitted)). The Court explained that "removal was contingent not upon a finding that in fact an alien was 'dangerous,' " since "[t]he President was careful to call for the removal of aliens 'deemed by the Attorney General to be dangerous,' " rather than those who

This interpretation of Section 102(c) cannot be overcome by application of the general presumption that agency action is subject to judicial review. The presump-

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were dangerous in fact (*id.* at 165). Similarly, in *United States ex rel. Brown* v. *Lane*, 232 U.S. 598 (1914), the Secretary of the Interior was authorized by statute to remove from an Indian tribal council " 'any member or members thereof for good cause, to be by him determined.' " 232 U.S. at 599 (citation omitted). The Court concluded that the statute "plainly vested the Secretary of the Interior with the power and discretion to remove" a person from the council without the need to offer notice or a hearing. *Id.* at 601.

Accord *Torpats* v. *McCone*, 300 F.2d 914, 914 (D.C. Cir.), cert. denied, 371 U.S. 886 (1962) (the court, in construing Section 102(c), did not require the Director to explain why he deemed it "in the interests of the United States" to remove the employee and simply determined that the Director had acted within his statutory authority); *Scher* v. *Weeks*, 231 F.2d 494 (D.C. Cir.), cert. denied, 351 U.S. 973 (1956) (similar construction of a statute authorizing the Secretary of Commerce to remove an employee "whenever he shall deem such termination necessary or advisable in the best interests of the United States"); *Baker* v. *United States*, 224 Ct. Cl. 760, 762 (1980), cert. denied, 450 U.S. 1040 (1981) (citation omitted) (Section 102(c) " 'gave the Director the absolute right to terminate any employee whenever he deemed it necessary or advisable' "); *Rhodes* v. *United States*, 156 Ct. Cl. 31, 36, cert. denied, 371 U.S. 821 (1962) (former CIA employee could not challenge his dismissal on the ground that it violated the Veterans Preference Act). Cf. *Falkowski* v. *EEOC*, 764 F.2d 907, 911 (D.C. Cir. 1985), cert. denied, No. 85-1894 (June 30, 1986) (Attorney General has the unreviewable discretion to decide whether to provide counsel for government employees in private litigation pursuant to his authority to attend to "the interests of the United States" under 28 U.S.C. 517). But cf. *Padula* v. *Webster*, slip op. 9 (relying on the court of appeals' decision in this case to review agency action for constitutional claims even when the action is committed to agency discretion by law). *Torpats* and *Baker* also recognized that, under Section 102(c), "the interests of the United States" are not limited to threats to the national security.

The majority below made no effort to distinguish *Service*, *Baker*, or *Rhodes*. It distinguished *Torpats* on the ground that *Torpats*

tion of reviewability is only a guide to congressional intent (*Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984)), and it should not be mechanically applied when the type of agency action involved is unsuitable for judicial review (*Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985)). It is inapposite in this setting for several reasons.

A presumption of reviewability would be peculiar in the context of removals from federal employment, since at the time the statute was enacted removals were not subject to judicial review. See *Carlin* v. *McKean*, No. 86-5510 (D.C. Cir. July 17, 1987), slip op. 6-7; cf. *Padula* v. *Webster*, No. 86-5053 (D.C. Cir. June 26, 1987), slip op. 6 (FBI's hiring decisions have traditionally been unreviewable). More particularly, personnel decisions affecting the national security are an integral part of the President's inherent constitutional responsibility to protect information bearing on national security. See *New York Times Co.* v. *United States*, 403 U.S. 713, 728-730 (1971) (Stewart, J., concurring).

Furthermore, removal decisions of the sort involved here are especially ill-suited to judicial review because the judgment whether a person in any way imperils the "interests of the United States" involves an inherently discretionary "prophecy" (*Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)) about the risk that he could be compromised and the dam-

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supposedly did not refuse to review the Director's decision to dismiss a CIA employee and instead held that the Director had acted within his statutory authority (Pet. App. 14a n.26, 18a-19a). In light of the District of Columbia Circuit's earlier decisions in *Service* v. *Dulles*, and *Scher* v. *Weeks*, however, the best reading of *Torpats* v. *McCone* is that the court believed that the Director had plenary authority under Section 102(c) to discharge a CIA employee.

age that would result from the disclosure of confidential information.[13] It will often rest on less than judicially provable facts and require an assessment of potentially great risks. Courts have "little or no background in the delicate business of intelligence gathering" (*CIA* v. *Sims*, 471 U.S. 159, 176 (1985)), and have no basis for determining a legally acceptable margin of error. They are therefore ill-equipped to second-guess Executive Branch decisions of this sort. *Vitarelli* v. *Seaton*, 253 F.2d 338, 342-343 (D.C. Cir. 1958), rev'd on other grounds, 359 U.S. 535 (1959); *Greene* v. *McElroy*, 254 F.2d 944, 953 (D.C. Cir. 1958), rev'd on other grounds, 360 U.S. 474 (1959); *Adams* v. *Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970); cf. *United States* v. *Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) (classification of information).

Moreover, in order to replicate the Director's decision-making process a court would have to be familiar with "'the whole picture'" (*CIA* v. *Sims*, 471 U.S. at 179). The disclosure of the necessary information would itself compromise sensitive interests. Also, in a particular case the Director may need to create the impression that his decision rested solely on one factor (such as poor performance) to avoid publicizing a far more sensitive basis for an employee's dismissal (such as a breach of security). In some cases, the Director may wish to offer no reason at all for his action. The litigation process is ill-suited to accommodate these concerns.

The fact that Section 102(c) contains a "standard"—"the interests of the United States"—for the Director to

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[13] This point is explained in greater detail in our brief in *Department of the Navy* v. *Egan*, cert. granted, No. 86-1552 (May 26, 1987). We have furnished a copy of our *Egan* brief to respondent's counsel.

apply in making personnel judgments, contrary to the court of appeals' view (Pet. App. 10a), does not necessarily mean that Congress intended the courts to review an agency's action. Under Section 102(c), it is quite clear that the standard is offered to guide the Director's action—to allow dismissal "whenever *he shall deem*" it necessary or advisable in the interests of the United States" (emphasis added)—and not to provide a basis for judicial action.

2. *The legislative history.* Congress adopted the National Security Act of 1947 because of shortcomings in American intelligence before Pearl Harbor and during World War II. The Act created the Central Intelligence Agency and placed the Director of Central Intelligence at the head of the CIA and over the intelligence community to remedy those deficiencies and to ensure that the nation could gather and analyze intelligence in peace and war. S. Rep. 239, 80th Cong., 1st Sess. 2 (1947); H.R. Rep. 961, 80th Cong., 1st Sess. 3-4 (1947); *CIA* v. *Sims*, 471 U.S. at 170. In restructuring our intelligence apparatus, Congress was acutely aware of the importance of secrecy to the ability to conduct intelligence activities (*id.* at 172),[14] and it took several steps in the National Security Act of 1947 and in later statutes to protect what it knew to be "the confidential nature of the Agency's functions" (H.R. Rep. 160, 81st Cong., 1st Sess. 7 (1949); see S. Rep. 106, 81st Cong., 1st Sess. 5 (1949)). One of the steps that Congress believed necessary to protect the nation's security in the 1940s and 1950s (as well as today) was to authorize the heads of certain federal agencies to suspend or dismiss a federal employee without the procedural guarantees otherwise provided by the civil service laws when the agency head found that national security concerns demanded that the employee be removed. Section 102(c) fits comfortably within this tradition.

Between 1940 and 1953, Congress adopted a series of 13 provisions authorizing the summary suspension or discharge of federal employees in the defense industry, the State and Commerce Departments, the Atomic Energy Commission, and the CIA in order to protect the national security.[15] These provisions gave the heads of

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[14] The Committees of both Houses went into executive session to consider the proposed legislation. *Sims*, 471 U.S. at 171 n.15, 172. The executive session of the House Hearings was declassified only in 1982. *National Security Act of 1947: Hearings on H.R. 2319 Before the House Comm. on Expenditures in the Executive Departments*, 80th Cong., 1st Sess. v-viii (1947) (published 1982) [hereinafter *Secret House Hearings*].

The witnesses who testified before Congress also brought home the importance of confidentiality. High-ranking intelligence officials advised Congress of the perils facing intelligence sources whose identities were revealed. *Secret House Hearings* 10-11 (statement of General Vandenberg, former head of the Central Intelligence Group, the predecessor of the CIA); *id.* at 20 (statement of Allen W. Dulles); *id.* at 59 (statement of Rear Adm. Inglis). In addition, Congress was informed of the risks both from using non-government personnel to gather intelligence and from the infiltration of our intelligence networks by foreign agents, or by their supporters. *Id.* at 10-11 (statement of General Vandenberg); *id.* at 50 (statement of Col. Grombach). Significantly, one expert recommended that a member of the armed forces be appointed as Director of the Agency during its early years of operation, because that would overcome the initial reluctance of the military to share intelligence with civilians, who could not be court-martialed for improperly divulging information. *Id.* at 8-9 (colloquy between Reps. Dorn and Hoffman and General Vandenberg).

[15] The 12 acts other than Section 102(c) were the Act of June 28, 1940, ch. 440, § 6, 54 Stat. 679; the Act of Dec. 17, 1942, ch. 739, § 3, 56 Stat. 1053; the Department of State Appropriation Act, 1947, ch. 541, Tit. I, 60 Stat. 458; the Atomic Energy Act of 1946, ch. 724, § 12(a)(4), 60 Stat. 771; the Department of State Appropriation Act, 1948, ch. 211, 61 Stat. 279; the Department of

these different federal departments the final say whether to discharge civil service personnel whose continued employment would present a risk to security. These contemporaneous statutes offer substantial evidence that Congress intended that the decision to remove an employee made by the head of an agency, such as the Director of Central Intelligence, would not be subject to correction or review. See *Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 137, 150-152 (1984).

Respondent contends (Br. in Opp. 9) that the legislative history of the National Security Act of 1947 is silent about Section 102(c), and that this silence shows that Congress did not intend to preclude review. That claim is not persuasive. The legislative history of the National Security Act of 1947 does not specifically address the meaning of Section 102(c), but the other contemporary evidence of congressional intent discussed above strongly supports our construction of the statute. Ironically, the most likely explanation for Congress's silence is that by

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State Appropriation Act, 1949, ch. 400, Tit. I, § 104, 62 Stat. 315; the Department of State Appropriation Act, 1950, ch. 354, Tit. I, § 104, 63 Stat. 447; the National Military Establishment Appropriation Act, 1950, ch. 787, Title VI, § 630, 63 Stat. 1023; the Act of Aug. 26, 1950, ch. 803, § 1, 64 Stat. 476 (codified at 5 U.S.C. 7532); the General Appropriation Act, 1951, ch. 896, § 1213, 64 Stat. 768; the Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1952, ch. 533, Tit. I, § 102, Tit. III, § 304, 65 Stat. 581, 594; the Departments of State, Justice, Commerce, and the Judiciary Apropriation Act, 1953, ch. 651, Tit. I, § 103, Tit. III, § 304, 66 Stat. 555, 567. Moreover, in 1950, in the course of enacting a general statute authorizing the removal of federal employees on national security grounds, 5 U.S.C. 7532, the House expressly rejected two proposals that would have subjected the removal decision to review by an outside body, such as the Civil Service Commission. 96 Cong. Rec. 10023-10029 (1950).

For the convenience of the Court, these 12 acts and the relevant portions of their legislative history are listed at App. B, *infra*.

1947 it was quite familiar with summary dismissal laws, because it had adopted five similar statutes in the previous seven years. Given these oft-stated, consistent, and contemporaneous expressions of legislative intent, Congress's silence does not undercut the meaning that is apparent on the face of Section 102(c).[16]

3. *The structure and objectives of the statutory scheme.* a. Section 102(c) is an internal component of a multipart statutory scheme designed to safeguard the intelligence-gathering activities of the CIA. Broadly speaking, this statutory scheme has four parts. First, Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. 403(d)(3), vested in the Director the responsibility "for protecting intelligence sources and methods from unauthorized disclosure" and granted him "broad power to protect the secrecy and integrity of the intelligence process" (*CIA* v. *Sims*, 471 U.S. at 170).[17] Second, Section 6 of the Central Intelligence Agency Act of 1949, 50 U.S.C. 403g, enables the Director to prevent the disclosure of the identities of CIA personnel, by exempting the CIA from any law requiring the publication of

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[16] See *Fullilove* v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area."). In any event, "Congress' silence is just that—silence" (*Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987), slip op. 7), and silence in the legislative history cannot impeach the statutory text (*Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 6; *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980)).

[17] The practice of designating information as "private," "confidential," or "secret" and to be withheld from the public began in the nineteenth century and has continued to the present. This practice is described in our brief in *Department of the Navy* v. *Egan*, *supra*. Except in extraordinary circumstances, the identities of intelligence operatives have never been disclosed.

"the organization, functions, names, official titles, salaries, or numbers of personnel" it employs. Third, Section 8(b) of that Act, 50 U.S.C. 403j(b), authorizes the Director to account for CIA expenditures by certificate for "objects of a confidential, extraordinary, or emergency nature," and thereby exempts those payments from the accounting requirements normally required for federal funds. See 31 U.S.C. 3524(c)-(e) (exempting the CIA's expenditures from external review outside intelligence channels).[18] Section 102(c) completes the picture by authorizing the Director to remove personnel when he deems it "necessary or advisable" to protect the intelligence process. See *Cole* v. *Young*, 351 U.S. 536, 546 (1956) (construing 5 U.S.C. 7532); *Haig* v. *Agee*, 453 U.S. 280, 309-310 (1981).

"[E]mployment with the CIA involve[s] an extremely high degree of trust" virtually unmatched elsewhere in

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[18] From the earliest days of the Republic Congress has consistently found that the national interest demands confidentiality regarding the expenditure of public funds for certain purposes, such as the conduct of foreign relations. See *United States* v. *Richardson*, 418 U.S. 166, 175 & n.7, 178 n.11 (1974); *Halperin* v. *CIA*, 629 F.2d 144, 159-161 (D.C. Cir. 1980); *Harrington* v. *Bush*, 553 F.2d 190, 195-196 (D.C. Cir. 1977). From the First Congress to the present, the President has been authorized to withhold a public accounting of the expenditures that he believed should not be made public. *E.g.*, Act of July 1, 1790, ch. 22, § 1, 1 Stat. 129 (authorizing the President to account only for the expenditures he believed should be made public); Act of Feb. 9, 1793, ch. 4, 1 Stat. 300 (establishing permanent authorization for the accounting of such funds by certificate if the President determined that the expenditure should not be made public); Rev. Stat. § 291 (1878 ed.) (codifying Act of Feb. 9, 1793); 31 U.S.C. 3526(e). Congress has also included in specific appropriations acts specific authority to account by certificate for expenditures in the area of foreign affairs. *E.g.*, Act of Mar. 3, 1887, ch. 342, 24 Stat. 481; Act of Apr. 29, 1926, ch. 195, 44 Stat. 335; 22 U.S.C. 2671; 31 U.S.C. 3526(e).

government. *Snepp* v. *United States*, 444 U.S. 507, 510 (1980). Agency personnel have access to highly classified information, including delicate intelligence-gathering and counter-intelligence operations in which the CIA is involved. Some employees may be susceptible to blackmail, bribery, or other means of influence or control by unfriendly foreign powers. For "reasons * * * too obvious to call for enlarged discussion" (*CIA* v. *Sims*, 471 U.S. at 170), the Director must have the ability swiftly to remove any employee in order to prevent the CIA's intelligence operations from being compromised. As the Court explained in *Cole* v. *Young*, 351 U.S. at 546: "There is an obvious justification for the summary suspension power where the employee occupies a 'sensitive' position in which he could cause serious damage to the national security during the delay incident to an investigation and the preparation of charges. Likewise, there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final day in deciding whether to repose his trust in an employee who has access to such information."

This interpretation of Section 102(c) as conferring a power of summary removal is consistent with this Court's construction in *CIA* v. *Sims* of a companion provision of the National Security Act of 1947, § 102(d)(3), 50 U.S.C. 403(d)(3), which authorizes the Director to protect "intelligence sources and methods" from unauthorized disclosure. *Sims* found that in 1947 Congress was acutely aware of "the practical necessities of modern intelligence gathering" (471 U.S. at 169) and "the importance of secrecy in the intelligence field" (*id.* at 172), particularly the need to protect "the heart of all intelligence operations—'sources and methods'" (*id.* at 167). *Sims* also found these considerations relevant to a proper

construction of Section 102(d)(3).[19] Those considerations are equally relevant here, because Congress could not have intended that the Director's authority to remove personnel in whom he lacks confidence be less extensive than his power to protect the CIA's intelligence-gathering activities.

b. Section 102(c) must also be viewed in the context of statutes applicable to intelligence agencies other than the CIA, and which presently govern relations between the several branches of the intelligence community. Other statutes authorize the Secretary of Defense summarily to remove an officer or employee of the National Security Agency and the Defense Intelligence Agency, and a civilian intelligence officer or employee of a military department. 50 U.S.C. 833(a); 10 U.S.C. (Supp. III) 1604(e); the Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 504, 100 Stat. 3198 (to be codified at 10 U.S.C. 1590(e)(1)); App. A, *infra*. Congress gave the Secretary of Defense this authority to allow him to regulate employees' access to sensitive information.[20] In so

[19] *Sims* repeatedly emphasized that Section 102(d)(3) vested in the Director "broad power" (471 U.S. at 173) and "very broad" and "wide-ranging authority" (*id.* at 168-169, 177) to "control the disclosure of intelligence sources" (*id.* at 173) and to "protect the secrecy and integrity of the intelligence process" (*id.* at 170) by authorizing the Director "to shield those Agency activities and sources from any disclosures that could unnecessarily compromise the Agency's efforts" (*id.* at 169). *Sims* further noted that, given "the harsh realities of the present day" (*id.* at 174), a narrow construction of Section 102(d)(3) could have "dangerous consequences" (471 U.S. at 174), in part because courts, which "have little or no background in the delicate business of intelligence gathering" (*id.* at 176) and are unfamiliar with " 'the whole picture' " (*id.* at 179), are not likely to judge correctly whether information should be disclosed (see also *ibid.*).

[20] For 50 U.S.C. 833(a), see S. Rep. 926, 88th Cong., 2d Sess. 2 (1964) (" 'This grant of authority recognizes the principle that

doing, Congress relied on the authority that it believed had already been given to the Director by Section 102(c) as the "statutory precedent" for these other summary removal provisions (H.R. Rep. 108, 88th Cong., 1st Sess. 4 (1963)).[21] In addition, pursuant to the generally ap-

the responsibility for control of those persons who are to have access to highly classified information should be accompanied by commensurate authority to terminate their employment when their retention and continued access to extremely sensitive information is not clearly consistent with the national security.' "); H.R. Rep. 108, 88th Cong., 1st Sess. 4 (1963) (same); *ibid.* ("The section enables the Secretary to terminate employment, when necessary, without jeopardizing the integrity and security of Agency activities through compliance with prolonged adversary proceedings"); *id.* at 5 (the Secretary's decision to invoke these procedures "shall be final and the basis for the determination will not be subject to review in any administrative or judicial proceeding."); H.R. Rep. 2120, 87th Cong., 2d Sess. 3, 4 (1962) (same statements as in above cited Senate and House Reports).

For 10 U.S.C. (Supp. III) 1604(e)(1), see S. Rep. 98-481, 98th Cong., 2d Sess. 8 (1984) (noting that "the protection of highly classified information is of paramount importance" and that "[t]he ability to meet security requirements and minimize the risk of compromise of dedicated intelligence personnel must be an important feature of the personnel management system").

[21] S. Rep. 926, *supra*, at 2 ("It is not novel for Congress to legislate the power of summary dismissal. In fact, Congress granted this same power to the Director of the Central Intelligence Agency in the National Security Act of 1947."); H.R. Rep. 108, *supra*, at 4 ("Moreover, statutory precedent exists. Similar authority to that granted in the bill has been vested by the Congress in the Director of Central Intelligence in section 102(c) of the National Security Act of 1947. The activities of the National Security Agency undoubtedly require equivalent protection from disclosure or compromise."); H.R. Rep. 2120, *supra*, at 4 (same); S. Rep. 98-481, *supra*, at 8-9 ("CIA management can exercise broad discretion for termination of employees. * * * Like CIA, NSA * * * has special termination authority peculiar to its needs. The Defense Intelli-

plicable provisions of 5 U.S.C. 7532, the head of every federal agency has the final authority summarily to suspend an employee and thereafter to discharge him if necessary to protect national security. *Cole* v. *Young*, 351 U.S. at 546-547; see *Haig* v. *Agee*, 453 U.S. at 309-310.[22]

Section 102(c) must be read in conjunction with these other statutes, since the CIA plays a central role in the intelligence community. The CIA reports to the National Security Council (50 U.S.C. 402, 403(a)) and has several responsibilities. The CIA must "advise the National Security Council in matters concerning [the] intelligence activities of the Government" that "relate to the national security" (50 U.S.C. 403(d)(1) and (2)); the Agency must "correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government" (50 U.S.C. 403(d)(3)); and, in general, the CIA must "coordinat[e] the intelligence activities of the several Government departments and agencies" (50 U.S.C. 403(d)), including the NSA and DIA, which report to the Secretary of Defense. Thus, given the centrality of the CIA's functions in the intelligence community, it would

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gence Agency should be able to operate its personnel management system on an equal footing with its two sister intelligence agencies.").

[22] S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950) ("The purpose of this bill is to increase the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks, and to terminate their services if subsequent investigation develops facts which support such action."); H.R. Rep. 2330, 81st Cong., 2d Sess. 1-5 (1950); 96 Cong. Rec. 9618 (1950) (Rep. Rees); H.R. Rep. 2264, 80th Cong., 2d Sess. 2 (1948) ("the Central Intelligence Agency * * * is provided adequate authority to deal with these matters under section 102(c) of the National Security Act of 1947."); S. Rep. 1155, 80th Cong., 2d Sess. 2-4 (1948).

be quite odd to construe the Director's authority to make personnel security decisions more narrowly than that of the Secretary of Defense, or Commerce. See *United States* v. *American Bldg. Maint. Indus.*, 422 U.S. 271, 277 (1975).

B. Section 102(c) Precludes Review Of Statutory And Constitutional Challenges To The Director's Action

The majority below was troubled by the prospect that Section 102(c) would foreclose review of respondent's constitutional claims (Pet. App. 14a n.27, 16a-17a & n.33, 18a & n.35, 24a, 27a; *id.* at 33a (Ginsburg, J., concurring)). This Court has also noted that a serious constitutional question would be raised by a statute barring a constitutional challenge to governmental action, and when possible the Court has read statutes as not foreclosing review of such claims. *E.g.*, *Bowen* v. *Michigan Academy of Family Physicians*, No. 85-225 (June 9, 1986), slip op. 14 n.12; *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974). At the same time, the Court has also made clear that a statute may not be judicially amended to avoid confronting a constitutional question, and that a constitutional issue may be avoided only when it is "fairly possible" to read a statute in another way. *E.g.*, *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 6; *Heckler* v. *Matthews*, 465 U.S. 728, 742-743 (1984); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). In fact, "a distortion of the congressional purpose" is unjustified "even if the clearly correct purpose * * * leads inevitably to a holding of constitutional invalidity" (*United States* v. *Sullivan*, 332 U.S. 689, 693 (1948)).

It is not "fairly possible" to interpret Section 102(c) in a way that does not bar review of all challenges to the Director's actions.[23] The text of the act does not distin-

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[23] We also believe that the majority below erred in concluding that respondent has presented an arguable constitutional claim.

guish between constitutional and nonconstitutional claims; it vests the Director with unreviewable discretion "notwithstanding * * * any other law." [24] Congress intended that the Director's action would be final, and review for any reason would frustrate that purpose. Similarly, disclosure of the facts and rationale underlying the Director's actions will damage the CIA functions regardless of the basis on which those actions are challenged. In sum, the statute cannot reasonably be read to allow judicial review of the Director's dismissal decisions when constitutional challenges to the Director's action are presented. For the reasons set forth in Point III below, we believe that the statute so construed is constitutional.

The majority conceded that this Court's decision in *Bowers* v. *Hardwick*, No. 85-140 (June 30, 1986), and the court of appeals' own previous decision in *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984), make clear that "homosexual *conduct* is not constitutionally protected" (Pet. App. 27a (emphasis in original)). The D.C. Circuit recently reaffirmed this conclusion in *Padula* v. *Webster*, slip op. 14, stating that "FBI agents perform counterintelligence duties that involve highly classified matters relating to the national security. It is not irrational for the Bureau to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes many homosexuals, even 'open' homosexuals, to the risk of possible blackmail to protect their partners, if not themselves." That is sufficient to dispose of respondent's claims, because he stated in his amended complaint that he "has engaged in homosexual activities since 1976" (J.A. 15; see also *id.* at 24). Judge Buckley was correct (Pet. App. 52a-54a) that the majority strained to find an arguable constitutional claim.

[24] Likewise, the APA preclusion sections (5 U.S.C. 701(a)(1) and 701(a)(2)) do not distinguish between constitutional and nonconstitutional claims even though the APA's cause of action includes cases where the agency has acted "contrary to constitutional right" (5 U.S.C. 706(2)(B)).

II. RESPONDENT CANNOT BRING AN ACTION AGAINST THE DIRECTOR UNDER 28 U.S.C. 1331 TO OBTAIN REINSTATEMENT WITH THE CIA

Respondent argues (Br. in Opp. 3) that, even if review under the APA is foreclosed, the district court has authority under 28 U.S.C. 1331 to order him reinstated with the CIA.[25] We submit that following the 1976 amendments to the APA, such an action is plainly unavailable.

In 1976, Congress amended the APA to clarify what it saw as uncertainty regarding the availability of injunctive actions against government officers.[26] Congress

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[25] Neither court below considered this issue. We will address it, however, because respondent has indicated that he will present it as an alternative ground for affirmance.

[26] Absent a waiver by Congress, a suit to enjoin action by a federal officer is barred by sovereign immunity when the United States itself would be restrained by a judgment sought. *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963) ("The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (citations omitted) ("The general rule is that a suit is against the sovereign if 'the judgment sought would * * * interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it (act.'"); *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 688-689 (1949); see *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 101-102 & n.11 (1984) (same rule under Eleventh Amendment).

At the same time, this Court has held that where a plaintiff seeks to restrain allegedly unconstitutional action by a federal officer, the action should not be deemed one against the sovereign because "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 690 (1949); *Ex parte Young*, 209 U.S. 123 (1908); *United States* v. *Lee*, 106 U.S. 196 (1882). The application of this exception is further complicated because the Court has said it may not apply "if the relief requested can not be granted by merely ordering the cessation of the conduct

concluded that there had been a "'totally erratic,' haphazard, unpredictable, unfair, inconsistent, and, in some situations unjust" application of sovereign immunity, and an arbitrary application of the exceptions allowing suit because certain actions against federal officers could be viewed as suits to restrain the individual rather than the government. S. Rep. 94-996, 94th Cong., 2d Sess. 2, 4, 6, 7, 26 (1976); H.R. Rep. 94-1656, 94th Cong., 2d Sess. 6-7 (1976). In particular, Congress found that "considerable confusion" existed "whether or not sovereign immunity bars actions for equitable relief" and whether "employment discrimination or discharge suits against Federal officers" could be filed. H.R. Rep. 94-1656, *supra*, at 7-8; S. Rep. 94-996, *supra*, at 6-7; cf. *Brown* v. *GSA*, 425 U.S. 820, 828-829 (1976). To remedy that problem, Congress amended the APA to waive the United States' sovereign immunity for an action "seeking relief other than money damages" (5 U.S.C. (Supp. III) 702).

In so doing, however, Congress did not authorize suits seeking equitable relief against the United States where judicial review of the agency's action is otherwise foreclosed. The waiver of sovereign immunity was accepted by the Executive Branch on the express condition that it would be subject to the other limitations imposed by the APA, such as the preclusion of review provisions of

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complained of but would require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson*, 337 U.S. at 691 n.11; *id.* at 713-715 (Frankfurter, J., dissenting). Some courts held that a federal employee could not sue his employer to obtain reinstatement or a promotion. See *Blaze* v. *Moon*, 440 F.2d 1348 (5th Cir. 1971) (dismissal); *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969); 397 U.S. 934 (1970) (promotion). Contra *Bowers* v. *Campbell*, 505 F.2d 1155 (9th Cir. 1974) (assignment and promotion); *DeLong* v. *Hampton*, 422 F.2d 21 (3d Cir. 1970) (dismissal).

5 U.S.C. 701(a)(1) and (2).[27] The Senate and House Reports on the 1976 APA amendments, moreover, state repeatedly that the amendments do not repeal other statutes precluding review. See H.R. Rep. 94-1656, *supra*, at 1-27; S. Rep. 94-996, *supra*, at 2-26. As then-Assistant Attorney General Scalia explained to Congress, "it is * * * an important factor in [the Justice Department's] support for the bill that the waiver of immunity, since it is made via § 702, * * * will be subject to the other limitations of the Administrative Procedure Act, including that which renders review unavailable 'to the extent that—(1) statutes preclude judicial review, or, (2) agency action is committed to agency discretion by law.' 5 U.S.C. 701(a). * * * These features were considered of great importance by the Administrative Conference Committee which originally drafted this legislative proposal, and they are important elements of the Department's support for the bill." H.R. Rep. 94-1656, *supra*, at 27 (letter from Assistant Attorney General Scalia to Subcomm. Chairman Kennedy); S. Rep. 94-996, *supra*, at 26 (same).[28]

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[27] The text of the amended APA reflects that compromise. Section 701(a)(1) and (2) provides that Chapter 7 of Title 5, which includes the APA's waiver of sovereign immunity, does not apply when judicial review is foreclosed. Section 702(1) provides that the waiver of sovereign immunity found in that section does not affect other limitations on judicial review. When read together, these provisions indicate that the APA's waiver of sovereign immunity is inapplicable where the APA does not authorize judicial review. See H.R. Rep. 94-1656, *supra*, at 27 (letter from Assistant Attorney General Scalia to Subcomm. Chairman Kennedy); S. Rep. 94-996, *supra*, at 26 (same); 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure 2d* § 3659, at 358 (1985) (footnote omitted) ("there is no consent to waive immunity when a statute precludes judicial review, or when the injurious action is committed to agency discretion by law").

[28] The Administrative Conference recommended that the sovereign immunity doctrine be modified, but the Conference also

In sum, the 1976 legislative compromise embodied an intent that equitable remedies not be available where other statutes prevent review under the APA. Section 102(c) is one of those statutes. It is an "explicit congressional declaration" (*Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 397 (1971); *Davis* v. *Passman*, 442 U.S. 228, 246-247 (1979)) that the Director must have the final say about who may work for the CIA. If that declaration is constitutional, courts may not nullify it by relying on 28 U.S.C. 1331 to order the CIA to reinstate a former employee over the Director's objection. See *Block* v. *North Dakota*, 461 U.S. 273, 280-286 (1983) (Congress's adoption of a comprehensive scheme in the Quiet Title Act, 28 U.S.C. 2409a, to adjudicate title disputes involving real property in which the United States claims an interest forecloses "officers' suits"); *Brown* v. *GSA*, 425 U.S. 820 (1976) (Congress's adoption of a comprehensive scheme in § 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, to remedy federal employment discrimination forecloses other forms of judicial relief).[29]

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believed that the modification should not affect other limitations on judicial review. See the Administrative Conference of the United States, *Recommendation No. 69-1—Statutory Reform of the Sovereign Immunity Doctrine* (adopted Oct. 21-22, 1969) (*reprinted at* S. Rep. 94-996, *supra*, at 22).

[29] Even if Section 102(c) were not itself a complete bar to review, it would be a powerful reason for not creating a reinstatement remedy within the intelligence community. See *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in the judgment) ("the range of policy considerations we may take into account is at least as broad as the gauge of those a legislature would consider with respect to an express statutory authorization of a traditional remedy"). Unlike damages (*Bivens*, 403 U.S. at 395), reinstatement is not a form of relief that federal courts have traditionally

III. SECTION 102(c) OF THE NATIONAL SECURITY ACT OF 1947 MAY CONSTITUTIONALLY BE APPLIED TO DENY AN EMPLOYEE OF THE CIA A JUDICIAL REINSTATEMENT REMEDY, BECAUSE IT IS A REASONABLE MEANS OF PROMOTING THE GOVERNMENT'S COMPELLING INTEREST IN PROTECTING THE FACT AND APPEARANCE OF SECRECY IN THE INTELLIGENCE PROCESS

If the Court concludes that plaintiff has raised a colorable constitutional claim, the final question is whether Section 102(c) may be validly applied to preclude review of respondent's constitutional challenges to his discharge.[30] Of critical importance in addressing this issue is the national security context in which the statute operates. The extraordinary considerations justifying the denial of a judicial remedy of reinstatement in these circumstances

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awarded federal employees; in fact, the contrary is true. See *White* v. *Berry*, 171 U.S. at 377-378 (absent an express statute to the contrary, federal courts may not order a federal employee reinstated). Moreover, Section 102(c) and the numerous former and current summary removal provisions applicable to other agencies and intelligence services qualify as "special concerns counseling hesitation" (*Davis*, 442 U.S. at 246) in creation of a reinstatement remedy. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 538-542 (1985) (Stevens, J., concurring in the judgment) (provision in the federal wiretapping laws specifically exempting interceptions under President's authority for national security purposes should counsel some hesitation in creating a damages remedy against the Attorney General for ordering such a wiretap). These statutes show that reinstatement with an intelligence agency is an inappropriate form of relief even for a person who has been unconstitutionally discharged. Whether respondent could bring a *Bivens* suit for damages is not raised by this case.

[30] Neither court below resolved that question. We will address it, however, because the Court's answer to that question may influence its construction of Section 102(c). See *Johnson* v. *Robison*, 415 U.S. at 366-367.

distinguish this case from the far broader and much debated issue of legislative restriction of federal court jurisdiction.[31]

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[31] *E.g.*, Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984); *Symposium: Congressional Limits on Federal Court Jurisdiction*, 27 Vill. L. Rev. 893 (1982); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45 (1975); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981); Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129 (1981); Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 Ariz. L. Rev. 229 (1973); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise In Dialectic*, 66 Harv. L. Rev. 1362 (1953).

Section 102(c) is not subject to criticism on most of the grounds that have been voiced against laws restricting the jurisdiction of the federal courts. It does not use an invidious characteristic, such as race, as a basis for denying review. Compare *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982) (invalidating a state law forbidding busing on racial grounds); *Hunter* v. *Erickson*, 393 U.S. 385 (1969) (invalidating city charter amendment mandating a voters' referendum before any ordinance concerning racial, religious, or ancestral discrimination could become effective). Nor does it foreclose review to a group that can be fairly classified as "a discrete and insular minority" (*United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938)), because employees of an intelligence agency do not fit into such a niche. Section 102(c) cannot be challenged on the ground that Congress enacted it because of hostility towards any category of persons, claims, or particular federal court rulings. Compare *Hunter* v. *Underwood*, 471 U.S. 222 (1985) (state law restricting the right to vote invalidated on the ground that the motive for its adoption was hostility towards blacks). Finally, Section 102(c) does not attempt to dictate the outcome of cases or to require a court to resolve cases in disregard of the Constitution. Compare *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871) (invalidating federal statute directing the federal courts to decide particular cases in a particular manner).

1. Section 102(c) relates directly to the ability of the President to carry out his responsibilities as head of the Executive Branch concerning national security and foreign policy. That context is important because the government has a surpassing interest in the successful execution of national policy in these fields. As the Court has often recognized, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. at 307 (citation omitted); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964); *Cole* v. *Young*, 351 U.S. at 546; *Lichter* v. *United States*, 334 U.S. 742, 781 (1948); accord *Halperin* v. *Kissinger*, 807 F.2d 180, 187 (D.C. Cir. 1986) (Scalia, Circuit Justice, sitting by designation).

The Constitution looks to the Executive to execute the congressional policies necessary to safeguard our interests in these fields. Article II vests "[t]he executive Power" in the President and "establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982). This authority is particularly broad in connection with national security and foreign affairs. "In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations." *New York Times Co.* v. *United States*, 403 U.S. at 727 (Stewart, J., concurring); see also *id.* at 741 (Marshall, J., concurring); *id.* at 756-758 (Harlan, J., dissenting); *id.* at 761 (Blackmun, J., dissenting). As Commander-in-Chief, the President shoulders the ultimate responsibility for the nation's security. Art. II, § 2, Cl. 1; *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. at 109-112. The President has

"the fundamental duty, under Art. II, § 1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means." *United States* v. *United States District Court*, 407 U.S. 297, 310 (1972). The Executive also wields "very delicate, plenary, and exclusive power" over the conduct of foreign affairs, and he serves as the "sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Export Co.*, 299 U.S. 304, 320 (1936); see also *Goldwater* v. *Carter*, 444 U.S. 996, 1002-1005 (1979) (Rehnquist, J., concurring in the judgment); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *United States* v. *Pink*, 315 U.S. 203, 222-223 (1942). The authority of the President in foreign affairs or national security is also at its apogee when, as here, he acts pursuant to express authorization from Congress. *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981), *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

2. Intelligence-gathering activities are necessary for the President to resolve the "important, complicated, delicate, and manifold problems" in foreign affairs (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. at 319). Since the end of World War II, the President has been forced to rely increasingly on intelligence to obtain advance warning about aggressive moves by hostile foreign powers. Today, "[i]t is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence." *Snepp* v. *United States*, 444 U.S. at 512 n.7.

It is also elementary that secrecy is crucial to the effective operation of the intelligence process. The President must be able to rely on "intelligence services whose

reports are not and ought not to be published to the world" (*Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. at 111). Intelligence activities, including military and diplomatic undertakings, have been carried out in secret throughout our history. Covert intelligence operations demand special protection to ensure that intelligence sources are not compromised and that diplomatic policies are not embarrassed. Doubts about our ability to shelter information will make friendly nations less willing to share it with us. In some cases, the continued availability of intelligence sources depends upon the Executive's ability to guarantee the security of information that might compromise their identity and endanger their safety. See *Snepp* v. *United States*, 444 U.S. at 512-513; *New York Times Co.* v. *United States*, 403 U.S. at 728-730 (Stewart, J., concurring). Without protection for the integrity of the intelligence process, our intelligence services "would be virtually impotent." *CIA* v. *Sims*, 471 U.S. at 170. The Court has therefore acknowledged with particular reference to the CIA, that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, 444 U.S. at 509 n.3; see also *CIA* v. *Sims*, 471 U.S. at 175; *Haig* v. *Agee*, 453 U.S. at 307; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. at 111; *Totten* v. *United States*, 92 U.S. 105, 106-107 (1875).

3. Nor is there anything extraordinary about foreclosing litigation that could require the government to disclose secrets potentially damaging to vital national interests.[32] On the contrary, in *Totten* v. *United States*,

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[32] Many, if not most, of the actions of the political branches in the national security and foreign policy fields are not subject to

92 U.S. 105 (1875), this Court approved that practice nearly three quarters of a century before the National Security Act of 1947 was adopted. There, the Court ruled that federal courts should dismiss an action requiring the government to divulge information relating to employment with an intelligence agency, because "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated" (*id.* at 107). See also *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 146-147 (1981) (reaffirming *Totten*).[33] The state secrets

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judicial oversight. As Justice Jackson wrote in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952) (footnote omitted) "the conduct of foreign relations [and] the war power * * * are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Questions regarding the validity of treaties, the recognition of foreign nations, and the commitment of military forces are for the political branches of government to resolve, even though the answer to these questions may have a profound impact on individuals. See, *e.g.*, *Goldwater* v. *Carter*, 444 U.S. at 1002-1005 (Rehnquist, J., concurring in the judgment); *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation * * * which challenges the legality, the wisdom, or even the propriety of sending our armed forces abroad or to any particular region"); *United States* v. *Pink*, 315 U.S. at 228-230; *Luftig* v. *McNamara*, 373 F.2d 664, 665 (D.C. Cir. 1967) (whether the United States' actions in Vietnam were constitutional is a political question); *Eminente* v. *Johnson*, 361 F.2d 73 (D.C. Cir.), cert. denied, 385 U.S. 929 (1966); *Pauling* v. *McNamara*, 331 F.2d 796, 798 (D.C. Cir. 1963), cert. denied, 377 U.S. (1964) ("decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them").

[33] In *Totten*, the Court held that a party could not bring suit for breach of an employment contract concerning the conduct

privilege can also prevent a party from obtaining relief, even for a constitutional claim. Under that privilege, state secrets—*i.e.*, information that could impair the nation's defense, reveal intelligence gathering methods or capabilities, or disrupt diplomatic relations with foreign governments—are absolutely privileged from disclosure regardless of the strength of the competing private or public need for information. Because of the privilege, an action may be dismissed, even if constitutional claims are involved, when a plaintiff cannot establish his case without the use of such information. See, *e.g.*, *United States* v. *Reynolds*, 345 U.S. 1 (1953); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Halkin* v. *Helms*, 690 F.2d 977 (D.C. Cir. 1982); *Salisbury* v. *United States*, 690 F.2d 966 (D.C. Cir. 1982); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc).[34]

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of espionage activities. The Court further explained (92 U.S. at 106-107):

> Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. * * * The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

[34] Respondent argues (Br. in Opp. 5-6) that the Director can protect confidential information under the military or state secrets privilege or 50 U.S.C. 403(d)(3) and 403g. That argument misses the point. The military and state secrets privilege was generally

Section 102(c) augments the protection provided by the privilege. It avoids the risk that even invoking the state secrets privilege will reveal matters of interest to a hostile power. That risk may seem unimportant in an individual case, because a court will not know the context in which it appears. This Court, however, has recognized that "[i]t is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency," which will have "both the capacity to gather and analyze any information that is in the public domain and the substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details." *CIA* v. *Sims*, 471 U.S. at 178-179.[35] That risk will be enhanced, however, if the Director over time is compelled to reveal the CIA's personnel practices. A hostile power could learn from the Director's rationale whether it had successfully

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established before Congress adopted the National Security Act of 1947 and the CIA Act of 1949. *Totten* v. *United States*, 92 U.S. 105 (1875); see *United States* v. *Reynolds*, 345 U.S. at 6-8 (discussing the origins of the privilege). If these privileges were sufficient, it would have been unnecessary to enact Section 102(c). Respondent's argument renders that section superfluous.

[35] See *Gardels* v. *CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982) (quoting *Halperin* v. *CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980)) ("'[E]ach piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.'"); *Halkin* v. *Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) ("foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate"); *United States* v. *Marchetti*, 466 F.2d at 1318 ("What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.").

penetrated a certain network of employees, thereby defeating the Agency's efforts to protect its counterintelligence operations. Moreover, because the courts must determine whether the state secrets privilege is applicable (*United States* v. *Reynolds*, 345 U.S. at 8), Section 102(c) protects against the risk that a court will misjudge the need for secrecy.

To be sure, respondent was discharged, not simply denied access to confidential information. But that fact does not call for a different answer. To begin with, insofar as respondent has sought a form of relief that only the United States can afford him, he must overcome the sovereign's immunity from suit, which is triggered, absent a waiver, whenever the relief sought operates against the United States. See page 29 note 26, *supra*. That immunity applies regardless of the substantive issue on which the claim is brought. *Lynch* v. *United States*, 292 U.S. 571, 581-582 (1934); *Bartlett* v. *Bowen*, 816 F.2d 695, 718-730 (D.C. Cir. 1987) (Bork, J., dissenting).[36] If, as here, a plaintiff's claim would be barred by sovereign immunity, it is difficult to imagine that Congress acts unconstitutionally by failing to provide an affirmative judicial remedy.

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[36] As Justice Brandeis explained in the *Lynch* case (292 U.S. at 581-582):

> The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress * * * and to those arising from some violation of rights conferred upon the citizen by the Constitution, *Schillinger* v. *United States*, 155 U.S. 163, 166, 168 [1894] * * *.
>
> When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States* v. *Babcock*, 250 U.S. 328, 331 [1919]. It may limit the individual to administrative remedies. *Tutun* v. *United States*, 270 U.S. 568, 576 [1926].

Beyond that, for most of our history the President had absolute power to remove federal employees for any reason, and the federal courts lacked authority to review the Executive's action absent an express statutory restraint. Indeed, public employees could generally be required to surrender their constitutional rights as a condition of their employment.[37] That doctrine is, of course, not the law today. See generally *Connick* v. *Myers*, 461 U.S. 138 (1983). But the government may impose reasonable restrictions on the actions of federal employees, especially intelligence personnel. *Snepp* v. *United States*, 444 U.S. at 509 n.3; cf. *Brown* v. *Glines*, 444 U.S. 348, 353-358 (1980). Section 102(c) is just such a reasonable limitation of employee rights.

Decisions of this Court and the lower federal courts demonstrate that the Constitution is sufficiently flexible that it can accommodate the government's interests in national security areas. For instance, in *Cole* v. *Young*, 351 U.S. at 546-547, this Court acknowledged that federal employees in sensitive positions whose continued employment could have discernible adverse effects on the nation's security can be summarily suspended without a presuspension hearing. The District of Columbia

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[37] *E.g.*, *Adler* v. *Board of Education*, 342 U.S. 485 (1952); *Garner* v. *Los Angeles Board*, 341 U.S. 716 (1951); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947); *United States* v. *Wurzbach*, 280 U.S. 396, 398-399 (1930); *Ex parte Curtis*, 106 U.S. 371 (1882).

Justice Holmes uttered the classic formulation of this principle, stating that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). The result, as this Court once noted, was that "this court can have no control over the appointment or removal, nor entertain any inquiry into the grounds of removal. If the [appointing authority] is chargeable with any abuse of his power, this is not the tribunal to which he is amenable." *In re Hennen*, 38 U.S. (13 Pet.) at 261.

Circuit expressly held in *Scher* v. *Weeks*, 231 F.2d 494, 494, cert. denied, 351 U.S. 973 (1956), that a summary removal statute similar to Section 102(c) did not violate the Due Process Clause. See also *Haig* v. *Agee*, 453 U.S. at 309-310 (the government may rescind a passport without offering its holder a prior hearing when there is a substantial likelihood that his actions in a foreign country will seriously damage national security or foreign policy). *Snepp* v. *United States*, 444 U.S. at 509 n.3, ruled that a person accepting employment with the CIA may be required, consistently with the First Amendment, to agree to a prior restraint on his opportunity to write about intelligence matters as a condition of his employment with the Agency. See also *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975); *United States* v. *Marchetti*, 466 F.2d at 1313-1318 (both upholding the government's right to obtain an injunction against publication in cases like *Snepp*); cf. *Brown* v. *Glines*, 444 U.S. at 353-358 (upholding over a First Amendment challenge regulations requiring servicemen to obtain the approval of their commanding officer to circulate petitions on base).

Section 102(c) is also narrowly tailored to employment voluntarily undertaken with the CIA. In some instances, an employee can be transferred elsewhere within the Agency, rather than be discharged. Even if a person is removed from the CIA, he is not disabled from holding other federal employment. The last clause of Section 102(c) provides that removal from the CIA does not itself prevent an employee from obtaining other federal employment if the head of the U.S. Civil Service Commission (now the Director of the Office of Personnel Management) concludes that he can be employed elsewhere in the federal government. Accord 10 U.S.C. (Supp. III) 1604(e)(2); 50 U.S.C. 833b; the Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 504, 100 Stat.

3198 (to be codified at 10 U.S.C. 1590(e)(2)) (to the same effect).

Precluding review of the Director's removal decisions is not the equivalent of immunity from all legal, political, and personal consequences. Congressional inquiry and oversight, criticism from other Executive Branch officials, and dismissal of the Director from office should not be discounted. Congress has established select committees on intelligence in both chambers, and persons such as respondent can seek relief in those forums. The President has also established the Intelligence Oversight Board for the Executive Branch, and parties such as respondent may seek relief there as well. Given these safeguards, the risks posed by judicial inquiry into this sensitive area, and Congress's established attitude toward the need for summary dismissal authority in the national security services, judicial review of national security dismissals must be deemed precluded, even for "arguable" constitutional claims.

4. In summary, there are occasions when the public interest in the security and integrity of intelligence establishments must prevail over the public and private interests in the vindication of individual rights. That is true in this case. Section 102(c) requires a CIA employee to forego the opportunity to overturn in court the Director's decision that the employee should no longer work for the CIA. The act does so in order to strengthen the Director's ability to protect the intelligence process. And that result is in the interests of every citizen, including the one who has been discharged. As Viscount Simon wrote in *Duncan* v. *Cammel Laird & Co.*, [1942] A.C. 624 (H.L.); [1492] 1 All E.R. 587, 595-596, in a decision upholding the British government's refusal to disclose certain secret information: "After all, the public interest is also the interest of every subject of the realm, and while, in the exceptional cases, the private citizen may seem to be denied

what is to his immediate advantage, he like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

The current summary dismissal statutes applicable to personnel employed in the intelligence community other than in the CIA and in related areas are the following:

1. 50 U.S.C. 833 provides, in pertinent part, as follows:

> (a) Notwithstanding sections 7512 and 7532 of title 5, or any other provision of law, the Secretary [of Defense] may terminate the employment of any officer or employee of the [National Security] Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.
>
> (b) Employment in other departments or agencies—Termination of employment under this section shall not affect the right of the officer or employee involved to seek or accept employment with another department or agency of the United States if he is declared eligible by the Director of the Office of Personnel Management.

2. 10 U.S.C. (Supp. III) 1604(e) provides, in pertinent part, as follows:

> (1) Notwithstanding any other provision of law, the Secretary of Defense may, during fiscal years 1985 and 1986, terminate the employment of any civilian officer or employee of the Defense Intelligence Agency whenever he considers that action to be in the interests of the United

States and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such officer or employee cannot be invoked in a manner consistent with the national security. The decisions of the Secretary under this paragraph are final and may not be appealed or reviewed outside the Department of Defense. The Secretary of Defense shall promptly notify the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate whenever this termination authority is exercised.

(2) Any termination of employment under this subsection shall not affect the right of the officer or employee involved to seek or accept employment with any other department or agency of the United States if he is declared eligible for such employment by the Director of the Office of Personnel Management.

Section 502 of the Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, 100 Stat. 3198, extended the Secretary's summary dismissal authority under 10 U.S.C. (Supp. III) 1604(e)(1) to fiscal years 1986 and 1987. H.R. Conf. Rep. 99-952, 99th Cong., 2d Sess. 24 (1986); H.R. Rep. 99-690, 99th Cong., 2d Sess. Pt. 1, at 20-21 (1986); S. Rep. 99-307, 99th Cong., 2d Sess. 7-8 (1986).

3. The Intelligence Authorization Act for Fiscal Year 1987, § 504, Pub. L. No. 99-569, 100 Stat. 3198 provides, in pertinent part, as follows:

> (a) Chapter 81 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"§ 1590. Management of civilian intelligence personnel of the military departments

• • • • •

"(e)(1) Notwithstanding any other provision of law, the Secretary of Defense may, during fiscal year 1987, terminate the employment of any civilian intelligence officer or employee of a military department whenever he considers that action to be in the interests of the United States and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of such officer or employee cannot be invoked in a manner consistent with the national security. The decisions of the Secretary under this paragraph are final and may not be appealed or reviewed outside the Department of Defense. The Secretary of Defense shall promptly notify the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate whenever this termination authority is exercised.

"(2) Any termination of employment under this subsection shall not affect the right of the officer or employee involved to seek or accept employment with any other department or agency of the United States if he is declared eligible for such employment by the Director of the Office of Personnel Management.

4. 5 U.S.C. 7532 provides as follows:

> (a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the

agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the head of the agency statements or affidavits to show why he should be restored to duty.

(b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.

(c) An employee suspended under subsection (a) of this section who—

(1) has a permanent or indefinite appointment;

(2) has completed his probationary or trial period; and

(3) is a citizen of the United States;

is entitled, after suspension and before removal, to—

(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of his case by the head of the agency or his designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

APPENDIX B

In the 1940s and 1950s, Congress enacted a series of appropriations bills and one substantive law authorizing the summary suspension or removal of federal personnel employed in the defense industry, the State and Commerce Departments, and the Atomic Energy Commission. Those provisions were:

1. The Act of June 28, 1940, ch. 440, § 6, 54 Stat. 679. See H.R. Conf. Rep. 2706, 76th Cong., 3d Sess. 6 (1940); S. Rep. 1863, 76th Cong., 3d Sess. 3, 6, 13 (1940); H.R. Rep. 2257, 76th Cong., 3d Sess. 4 (1940); 86 Cong. Rec. 7023 (1940) (Rep. Vinson); *id.* at 7026-7027 (Rep. Cole); *To Expedite Naval Shipbuilding: Hearings on H.R. 9822 Before the Senate Comm. on Naval Affairs*, 76th Cong., 3d Sess. 71 (1940) (Capt. C.W. Fisher); *id.* at 108-109 (Paul Scharrenberg, National Legislative Representative, AFL); *id.* at 131 (Charles Stengle, Amer. Fed. Gov't Employees); *id.* at 142-143 (N.P. Alifas, Int'l Ass'n of Machinists).

2. The Act of Dec. 17, 1942, ch. 739, § 3, 56 Stat. 1053. See S. Rep. 1673, 77th Cong., 2d Sess. 2, 3 (1942); H.R. Rep. 2511, 77th Cong., 2d Sess. 2, 3 (1942); S. Rep. 1451, 77th Cong., 2d Sess. 2 (1942); H.R. Rep. 1653, 77th Cong., 2d Sess. 2 (1942); 88 Cong. Rec. 5133 (1942) (Sen. Walsh); *id.* at 5462 (Rep. Vinson); *Hearings on Sundry Legislation Affecting the Naval Establishment Before the House Comm. on Naval Affairs*, 77th Cong., 2d Sess. 3455 (1942) (RADM A.H. Van Keuren); *id.* at 3456 (letter from Acting Secretaary of the Navy Forrestal to Rep. Rayburn); *id.* at 3462 (Rep. Drewry).

3. The Department of State Appropriation Act, 1947, ch. 541, Tit. I, 60 Stat. 458. See H.R. Conf. Rep. 2434, 79th Cong., 2d Sess. 10 (1946); 92 Cong. Rec. 7295 (1946) (Rep. McCarran).

4. The Atomic Energy Act of 1946, ch. 724, § 12(a)(4), 60 Stat. 771. See S. Rep. 1211, 79th Cong., 2d Sess. 28 (1946).

5. The Department of State Appropriation Act, 1948, ch. 211, Tit. I, 61 Stat. 279. See *Departments of State, Justice, Commerce, and the Judiciary Appropriation Bill for 1948: Hearings on H.R. 3311 Before the Subcomm. of the Senate Comm. on Appropriations*, 80th Cong., 1st Sess. 646 (1947) (colloquoy between Assistant Secretary of State Peurifoy and Sen. Ball regarding the McCarran rider).

6. The Department of State Appropriation Act, 1949, ch. 400, Tit. I, § 104, 62 Stat. 315. See H.R. Rep. 1433, 80th Cong., 2d Sess. 3-4 (1948); 94 Cong. Rec. 2079 (1948) (Rep. Gary); *id.* at 2085-2086 (Rep. Taber); *id.* at 2159 (Rep. Keefe); *Department of State Appropriation Bill for 1949: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 80th Cong., 2d Sess. 176, 207-208 (1948) (Hamilton Robinson, State Dep't Office of Control).

7. The Department of State Appropriation Act, 1950, ch. 354, Tit. I, § 104, 63 Stat. 456. See *Department of State Appropriation Bill for 1950: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 81st Cong., 1st Sess. 61 (1949) (colloquy between Ass't Sec'y of State Puerifoy and Rep. Boykin).

8. The National Military Establishment Appropriation Act, 1950, ch. 787, Tit. VI, § 630, 63 Stat. 1023. See H.R. Conf. Rep. 1386, 81st Cong., 1st Sess. 8, 9 (1949).

9. The Act of Aug. 26, 1950, ch. 803, § 1, 64 Stat. 476 (codified at 5 U.S.C. 7532). See S. Rep. 1155, 80th Cong., 2d Sess. 2 (1948); H.R. Rep. 2264, 80th Cong., 2d Sess. 2 (1948); *Summary Termination of Employment of Civilian Employees and to Equalize Retirement Benefits Among Members of the Nurse Corps of the*

Army and Navy: Hearings on S. 1651 Before the Subcomm. of the Senate Comm. on Armed Services, 80th Cong,. 1st Sess. 2-3 (1948) (Mark Andrews, Ass't Sec'y of the Navy); *id.* at 7-8, 14-15 (Arthur Fleming, Comm'r, U.S. Civil Service Comm'n); 96 Cong. Rec. 12048 (1950) (Sen. Saltonstall); *id.* at 9618 (Rep. Rees); *id.* at 10023-10029 (debate on whether to adopt amendments proposed by Reps. Miller and Holifield that would have given employees a right to appeal removal to the U.S. Civil Service Comm'n or to a newly-created, outside agency); *Summary Suspension—Civilian Government Employees and Other Bills: Hearings on H.R. 8139 et al. Before the Senate Comm. on Armed Services*, 81st Cong., 2d Sess. 5 (1950) (Felix Larkin, Gen'l Counsel, Office of the Sec'y of Defense); *To Protect the National Security of the United States: Hearings on H.R. 7439 Before the House Comm. on Post Office and Civil Service*, 81st Cong., 2d Sess. 2 (1950) (Rep. Murray); *id.* at 5, 6 (letter from Sec'y of Defense Johnson to Rep. Rayburn); *id.* at 14-15 (colloquy between Alfred Klein, Chief Law Off'r Civil Service Comm'n, and Rep. McCarthy); *id.* at 18 (Capt. A.S. McDiil, U.S. Navy, Director of Legislation); *id.* at 58, 89 (Felix Larkin, Assoc. Gen'l Counsel, Office of the Sec'y of Defense); *id.* at 97 (letter from Harry Mitchell, Chairman, U.S. Civil Service Comm'n to Rep. Murray).

10. The General Appropriation Act, 1951, ch. 896, § 1213, 64 Stat. 768. See 96 Cong. Rec. 5401, 5402 (1950) (Rep. Clevenger); *id.* at 5402 (Reps. Clevenger and Rooney); *id.* at 5403 (Rep. Miller); *id.* at 5480 (Rep. Marcantonio); *ibid.* (Rep. Rooney); *id.* at 5481 (Rep. Taber); *ibid.* (Reps. Rooney, Stefan, Marcantonio, and Crawford); *id.* at 5533 (Rep. Stefan); *id.* at 6725 (Rep. Norrell); *id.* at 6727 (Rep. Brown); *ibid.* (Rep. Rabaut); *id.* at 6729 (Rep. Cox); *id.* at 6731 (Rep. Colmer); *id.* at 11706 (Sen. Morse); *id.* at 11708 (Sen. McCarran); *id.* at 11709-11710 (Sen. Ferguson); *id.* at

11710 (Sen. Donnell); *ibid.* (Sen. Mundt); *Departments of State, Justice, Commerce and the Judiciary Appropriations for 1951: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 81st Cong., 2d Sess. Pt. 1, at 596 (1950) (Sen. Ferguson); *id.* at 596-597 (Ass't Sec'y of State Puerifoy); *id.* at 598 (colloquy between Sec'y of State Acheson and Sen. Bridges); *Department of State Appropriations for 1951: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 81st Cong., 2d Sess. Pt. 1, at 673-674 (1950) (colloquy between Rep. Stefan and Ass't Sec'y of State Puerifoy); *Department of Commerce Appropriations for 1951: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 81st Cong., 1st Sess. 2338-2342, 2344 (1950) (colloquy between Rep. Rooney and Exec. Ass't to Sec'y of State Gladieux).

11. The Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1952, ch. 533, Tit. I, § 103, Tit. III, § 304, 65 Stat. 581, 594. See *Department of State Appropriations for 1952: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 82d Cong., 1st Sess. 400-405 (1951) (Mr. Humelsine); *Departments of State, Justice, Commerce and the Judiciary: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 82d Cong., 1st Sess. Pt. 2, at 1986 (1951) (Mr. Humelsine).

12. The Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1953, ch. 651, Tit. I, § 103, Tit. III, § 304, 66 Stat. 555, 567. See *Departments of State, Justice, Commerce and the Judiciary Appropriations for 1953: Hearings on H.R. 7289 Before the Subcomm. of the Senate Comm. on Appropriations*, 82d Cong., 2d Sess. 389-390 (1952) (colloquy between Sen. Ferguson and Mr. Humelsine); *id.* at 408-409 (same); *id.* at 512-513 (Sen. McCarran).

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 86-1294

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

WILLIAM H. WEBSTER,
DIRECTOR OF CENTRAL INTELLIGENCE,
Petitioner,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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QUESTIONS PRESENTED

1. Whether this Court should consider an issue that petitioner expressly conceded in the courts below—that section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), does not preclude judicial review of a claim that the Director of Central Intelligence violated the Constitution in discharging respondent from the CIA.

2. Whether section 102(c) precludes judicial review under the Administrative Procedure Act, 5 U.S.C. § 702-06, of respondent's claim that the Director violated respondent's constitutional rights in discharging him from the CIA.

3. Whether section 102(c) so far commits the discharge power to the Director's discretion as to make judicial review of respondent's constitutional claim unavailable under the Administrative Procedure Act.

4. Whether, assuming that Congress did intend section 102(c) to preclude judicial review of claims that the Director's discharge decisions violate constitutional rights, that preclusion violates the Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1294

WILLIAM H. WEBSTER,
DIRECTOR OF CENTRAL INTELLIGENCE,
Petitioner,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

STATEMENT

The issue for this Court on the government's petition is whether Congress, when it enacted section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), intended to preclude judicial review of a claim by a former CIA employee that he was discharged, in violation of the Constitution, because of a CIA policy barring employment of all homosexuals. If the court of appeals'

decision is affirmed, only that claim will be available to respondent on remand to the district court. The government objects to this very limited review, arguing for page after irrelevant page what is unquestionably true—that the Director of Central Intelligence needs and was meant to have broad discretion in dealing with Agency personnel.

From this discussion of the Director's discretion the government draws the *non sequitur* conclusion that Congress has directed that federal courts cannot entertain suits to review the Director's personnel decisions, even narrowly, for constitutional flaws—a conclusion that has no support in the text of section 102(c), its legislative history, or any other reliable source of interpretive guidance. Moreover, the government advances this conclusion even though CIA personnel decisions are routinely, and without jurisdictional objection by the government, examined by United States courts to determine whether they violate the statutory proscription of race and sex discrimination contained in Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972. (*See* pp. 37-38, *infra*.)

A. Facts

The respondent Doe is not embarrassed or ashamed about his homosexuality, and his family, friends, and some of his neighbors are aware of his sexual orientation. He sues under the classical legal pseudonym not because of any concern that he not be identified as a homosexual, but because, as the government says, "his status as a CIA employee cannot be publicly acknowledged." (Pet. Br. 3.) Because of the openness of his homosexuality, Doe has alleged that he is not susceptible to blackmail or other pressures on account of it. (J.A. 6.) Moreover, Doe's homosexuality has never disrupted or adversely affected the performance of his duties during his eight years with the CIA, and he has not disclosed

any classified information to any sexual partner or to any other unauthorized person, as was confirmed by the CIA's polygraph examination of Doe. (J.A. 7.) Against this background, the Agency disclosed nothing to Doe or the courts below that refutes the obvious inference that the Director's decision to fire him was not a discretionary judgment that termination of Doe's employment in particular was "necessary or advisable in the interests of the United States," but was rather the implementation of a policy to fire known homosexuals.

Two documents appear to have formed the basis for the Director's decision, and the more critical of the two was never shown to respondent. The first, which Doe did see and had a chance to comment on, was a factual report prepared by the CIA officer who conducted Doe's polygraph interview. (J.A. 26.) The second was an "adjudication" of Doe's case prepared by security officers. (*Id.*) Neither Doe nor his counsel was ever permitted to review the adjudication.

Both documents were forwarded to the Director of Security. (J.A. 26.) Thereafter, a security officer informed Doe that the Office of Security had determined that the circumstances of Doe's homosexuality posed a security threat. (*Id.*) When Doe asked how or why this was so, the security officer refused to give any further explanation. (*Id.*) The officer then asked Doe to resign, but he refused. (J.A. 27.) The officer told Doe that the Office of Security would recommend that the Director of Central Intelligence terminate Doe's employment. (*Id.*)

A month later, the CIA's Deputy General Counsel informed Doe's counsel that the Director had "deemed it necessary and advisable in the interests of the United States to terminate [Doe's] employment." (J.A. 37.) The Deputy General Counsel provided no reasons for this determination. He did state, however, that "[t]he

Director has reviewed the facts of your client's case, your client's memorandum commenting upon those facts, the Office of Security's evaluation of the security significance of those facts, and the statement submitted by you in your client's behalf." (*Id.*)

At no point during either the administrative proceedings or the litigation below did the government contend that either the factual report or the "adjudication" is classified. Moreover, since Doe was the sole source of the facts reviewed by the Agency, determination of his case did not involve information provided by confidential sources.[1]

This summary administrative procedure, keeping the employee in the dark as to why he is being fired, is not—contrary to the impression given by petitioner's brief—the norm at the CIA. In fact, the prescribed practice under the Agency's regulations, and presumably the practice followed in most cases, is quite different. CIA Headquarters Regulation 20-27 sets forth standards and procedures for "separation from the agency." (J.A. 43-51.) Section 27m provides that "normally" an employee will be given the reasons for proposed separation and an opportunity to respond orally or in writing within ten days. (J.A. 48-49.) In addition, the regulations also provide for the appeal of an adverse decision. H.R. 27m(4) (J.A. 49). Section 27m provides that these procedures "should be followed insofar as practicable." (J.A. 48.) To account for cases where security considerations would make these procedures impractical, the regulations also provide that "employees

[1] It is apparent that Doe was the sole source of the facts of his case from the statement of the Deputy General Counsel that the Director reviewed the facts of Doe's case and Doe's memorandum "commenting upon those facts." (J.A. 37.) Since Doe's memorandum commented on the factual report prepared on the basis of Doe's polygraph interview, the facts reviewed by the Director—"those facts"—were limited to those in the interview report. Petitioner has never disputed this point throughout this litigation.

may be separated immediately and without regard to any suggested procedural steps when the Director of Central Intelligence considers it necessary or advisable in the interests of the United States." *Id.* In Doe's case, the CIA never indicated why the normal procedures were not "practicable" or that the Director had determined that it was necessary or advisable to ignore them.

B. Respondent's Claims

Although the issue before the Court on the government's petition is, for any practical purpose, the narrow one described at the outset of this statement, respondent asserted other substantive and procedural claims in addition to the substantive constitutional claim that the court of appeals recognized as available to him in the district court on remand. The court of appeals disposed of those other claims in a way so deferential to agency judgment that the court might as well have held that review of them was not available. Respondent's pending cross-petition, No. 86-1442, presents the question whether the court of appeals was correct in its disposition of those other claims of illegality. A knowledge of the full range of respondent's claims helps put the present narrow issue in context.

Respondent's amended complaint asserted that the Director's decision had violated both his substantive and procedural rights. Substantively, respondent asserted that the Director's decision to terminate him violated his constitutional rights to substantive due process, equal protection, and privacy. Procedurally, respondent contended that the Director, in making his decision, had not followed the procedures required by CIA regulations, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and the due process clause of the Fifth Amendment. For relief, respondent asked for reinstatement to his former position. In the alternative, he sought reinstatement to the administrative leave status in which he had been placed when he first informed the CIA of his homosexuality and a new determination of his case under fair procedures. A full statement of his claims follows.

1. Substantive Constitutional Rights

Respondent alleged that he was fired only because he is a homosexual and that discharge on this ground denied him substantive due process and equal protection of the laws, and invaded his constitutionally protected right of privacy. (J.A. 5.) Doe asserted that there was no rational basis, as required by the due process clause, for the determination that his homosexuality presented a security threat. (J.A. 11.) His equal protection claim was based on his assertion that, in being fired on account of his homosexuality, he was treated differently from the way a heterosexual CIA employee would have been treated and certainly differently from, and much more severely than, the way a heterosexual CIA employee who had engaged in extramarital or premarital sexual conduct would have been treated. (J.A. 10-11.) Respondent further claimed that to fire him for his sexual orientation, over which he has no control, was an invasion of his constitutional right of privacy, rooted in the First, Fourth, Fifth and Ninth Amendments. (J.A. 12.)

2. Procedural Claims

a. *CIA Regulations*

Doe pointed to CIA Headquarters Regulation 20-27m (J.A. 48), discussed above, and argued that there was no indication that the Director had found it "necessary or advisable" to suspend the procedures that the regulation prescribes for the usual case. The letter to Doe's counsel from the Agency's Deputy General Counsel simply stated that the Director found it necessary and advisable in the interests of the United States to terminate Doe's employment. (J.A. 37.) It made no mention of any finding with respect to suspension of the normal procedures.

Doe also argued that the circumstances of the case did not support any inference that it was "necessary or advisable" to suspend the procedures. Although Doe disclosed his homosexuality in January 1982, his case proceeded at a leisurely pace, and the Director did not terminate him until May 1982. Moreover, Doe was the source of all of the facts of his case, no confidential sources were involved in the investigation, and neither the facts nor the Office of Security's adjudication have been claimed to be classified.

b. *Administrative Procedure Act*

Apart from the Agency's regulations, Doe also claimed that as a person subject to an informal agency adjudication, he was entitled by the Administrative Procedure Act to know the reasons for the CIA's decision to fire him. This entitlement has two sources under the APA. First, 5 U.S.C. § 555(e) requires "a brief statement of the ground for denial" of any "written application, petition, or other request of an interested person made in connection with any agency proceedings."[2] Second, Doe argued that case law governing informal adjudications requires the minimal procedural protections of notice of the reasons for proposed adverse action and an opportunity to respond. *Dunlop* v. *Bachowski*, 421 U.S. 560, 571-72 (1975); *Gonzalez* v. *United States*, 348 U.S. 407, 413, 415 (1955); *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); *Moon* v. *Department of Labor*, 727 F.2d 1315, 1318 (D.C. Cir. 1984); *Independent U.S. Tanker Owners Committee* v. *Lewis*, 690 F.2d 908, 922-23, 925 (D.C. Cir. 1982); *Matlovich* v. *Secretary of the Air Force*, 591 F.2d 852, 857 (D.C. Cir. 1978).

c. *Procedural Due Process*

Doe's constitutional claim that he had been denied the process due him rested on his contention that the Director's decision invaded both his property and liberty in-

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[2] Section 555(e) provides:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

terests.[3] In either case, he contended that the failure to provide him with the Office of Security's adjudication and the Director's reasons for determining that it was necessary and advisable in the interests of the United States to terminate him violated the most minimal elements of due process, which entitle a public employee "to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 546 (1985). Doe recognized that in some circumstances it might be necessary for the Agency to withhold such information for reasons of security, but the CIA never made that assertion in this case.

C. District Court Proceedings

Six weeks after filing his complaint, and prior to any response from the government, Doe filed a motion for partial summary judgment based solely on his procedural claims and seeking only the limited relief of reinstatement to administrative leave status and a new determination of his case under fair procedures. The CIA subsequently filed a motion to dismiss and for summary judgment. Although this motion purported to address all of Doe's claims, the government did not brief Doe's claim that his substantive constitutional rights had been violated.

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[3] Doe's claim to a property interest in continued employment was based on his assertion that he had successfully completed the CIA's year-long period of probationary employment and that Agency regulations and policies gave him a reasonable expectation that the CIA would continue to employ him so long as his services were needed, he did his work well, complied with security regulations, and protected classified information from unauthorized disclosure. (J.A. 10, 20-21.) Doe's contention that the Director's decision invaded his liberty interest rested on the fact that if he applies for a job that requires a security clearance, with either the government or a government contractor, the CIA will inform the prospective employer that the Agency has determined that Doe is a security threat because of his homosexuality. (J.A. 10, 27.)

The district court rejected various defenses no longer asserted by petitioner and held that section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), does not preclude judicial review of the Director's termination decisions. (Pet. App. 75a-77a.) The court granted Doe's motion for partial relief solely on the ground that the CIA had failed to follow the procedures prescribed by its regulations. Thus, the district court did not decide whether the APA or the due process clause of the Fifth Amendment entitled Doe to the procedural protections he sought. Nor did the district court decide whether petitioner's decision to fire Doe violated his substantive constitutional rights.

D. Court of Appeals Opinion

The court of appeals held that section 102(c) neither explicitly precludes judicial review nor commits termination decisions to the absolute discretion of the Director. (Pet. App. 7a-19a.) Turning to the merits, the court held that, although the CIA was bound to follow its own regulations, these regulations did not limit the Director's discretion. (Pet. App. 19a.) In reaching this conclusion, the court overlooked Doe's argument that although the regulations authorize the Director to fire employees without regard to the normal procedures when he finds immediate separation to be necessary and advisable in the interests of the United States, there is no indication that the Director made such a finding in Doe's case.

The court then proceeded to determine the validity of the Director's decision to fire Doe pursuant to section 102(c). The court observed that "there is great confusion as to precisely what the Director intended to do in this case." (Pet. App. 24a.) Rather than remanding the case for a clear statement of reasons, the court hypothesized "three possible explanations for the Director's action" (Pet. App. 25a), and analyzed the permissibility of each hypothetical without knowing whether there was factual support for any of them.

First, the court hypothesized that the Director may have fired Doe for reasons unrelated to his homosexuality. (Pet. App. 25a.) Although the court noted that this was unlikely, it instructed the district court on remand to determine whether the Director fired Doe for unstated reasons other than homosexuality. (*Id.*) However, rather than requiring the Director to state his reasons—or to state that security considerations prevent a statement of reasons—the court of appeals further instructed the district court that "[i]f the Director intends to invoke section 102(c) without giving any reasons at all" (Pet. App. 25a), he will be required to explain his decision to fire the employee "[o]nly if a plaintiff offers a basis for suspicion that the Director terminated the plaintiff's employment for an impermissible reason." (Pet. App. 26a.) As examples of such "impermissible" reasons for termination, the court cited "sex, race, hair, color, etc." (*Id.*)

The court noted that Doe had not alleged any impermissible ground for his termination "unrelated to his homosexuality." *Id.* In reaching this conclusion, the court did not address Doe's arguments that (1) it is constitutionally improper to fire a person for homosexuality without any showing that the individual's homosexuality presents a security threat, and (2) without access to the Agency's reasons, he could not meaningfully address the Agency's assertion that the circumstances of his homosexuality presented a security threat. The court further held "that if the Director intended to invoke section 102(c) without reasons in this case, there are no grounds to reverse the Director's decision to terminate Doe's employment and, correspondingly, no basis for requiring the Director to explain his exercise of discretion under section 102(c)." (*Id.*). Thus, on remand, there appears to be no reason why the Director cannot simply decline to give any reasons for firing Doe and thereby avoid any obligation to explain why Doe's homosexuality presents a security threat.

As a second possible explanation for the Director's decision, the court of appeals hypothesized that Doe's termination was based on a CIA policy barring employment of all homosexuals. (Pet. App. 27a.) The court noted that the record was unclear with respect to the Agency's policy. On one hand, security officers told Doe that homosexuality violated Agency rules. On the other, the Agency's Deputy General Counsel told Doe's counsel that decisions to terminate homosexuals were made on a case-by-case basis. (*Id.*)[4]

The court of appeals ruled that if the district court found that CIA policy bars all homosexuals, "there is an *arguable* claim that can be litigated." (Pet. App. 27a, emphasis in original.) The court noted that although the decisions in *Bowers* v. *Hardwick*, 106 S. Ct. 2841 (1986), and *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984), "held that homosexual *conduct* is not constitutionally protected, they did not reach the difficult issue of whether an agency of the federal government can discriminate against individuals merely because of *sexual orientation*." (Pet. App. 27a, emphasis in original.) The court further held that if the CIA has a policy barring employment on the basis of sexual orientation, it would "[a]t the very least . . . have to justify why such a ban on the employment of all homosexuals was 'necessary or advisable in the interests of the United States.'" (*Id.*)

The third hypothetical explanation of the Director's decision examined by the court of appeals was the pos-

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[4] The court also noted that Doe was not immediately discharged upon informing the Agency of his homosexuality but was subjected to an extensive polygraph examination. (Pet. App. 27a.) "This," the court speculated, "suggests that his mere status as a homosexual was not the reason for his later discharge." (*Id.*) It is equally plausible that Doe's termination was preordained by a policy barring all homosexuals and that the polygraph examination was administered to determine whether Doe had compromised security rather than to determine whether he could remain with the Agency.

sibility that Doe was dismissed because the particular circumstances of his homosexuality presented a security risk. (Pet. App. 28a-32a.) The court ruled that if this was the case, the CIA's finding and its intention to communicate that finding to other government agencies requiring security clearance constituted a sufficient injury to Doe's liberty interest, reputation, and future employment prospects that due process concerns were implicated. (Pet. App. 30a.) However, the court went on to hold that Doe had been given an adequate opportunity to clear his name and that therefore he had received all the process he was due. (Pet. App. 31a-32a.)

The court supported this conclusion by noting that Doe was informed of the Agency's concern over his homosexuality, that he was permitted to review the polygraph officer's report and comment on it, and that his counsel was permitted to submit an argument on Doe's behalf. (*Id.*) But the court did not address Doe's principal contention that he was deprived of the most minimal elements of due process because he was never given access to the Office of Security's "adjudication" of his case or the reasons for the Director's conclusion that it was necessary or advisable in the interests of the United States to fire him.[5]

The court of appeals also did not address Doe's contentions that he was entitled to minimal procedural protections because (1) the Director's decision deprived him of his constitutionally protected property interest in continued employment with the CIA, and (2) the Administrative Procedure Act guarantees such protections. Similarly, the court did not discuss Doe's equal protection claim.

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[5] The court also noted that "Doe makes no allegation that either the Office of Security or the Director of Central Intelligence were biased." (Pet. App. 32a.) Without access to the "adjudication" or the Director's reasons, Doe cannot know whether the Office of Security or the Director was tainted by an impermissible or irrational antipathy toward homosexuals.

E. The Petitions for Certiorari

The Director of Central Intelligence filed his petition in the instant case seeking review of whether his decision to discharge an employee of the CIA pursuant to section 102(c) is judicially reviewable under the Administrative Procedure Act. Doe opposed this petition principally on the ground that under the court of appeals' remand to the district court, the only open questions are whether the CIA has a policy barring the employment of all homosexuals and whether that policy violates Doe's constitutional rights. Since the government conceded below that it was not prepared to argue that constitutional claims are precluded from review (Pet. App. 17a), there did not seem to be any genuine live dispute. Moreover, federal courts have entertained suits alleging that a federal official has acted unconstitutionally and seeking injunctive and declaratory relief long before section 10 of the Administrative Procedure Act was enacted, and a litigant does not need to invoke the present version of section 10, 5 U.S.C. §§ 701-06, to maintain such a suit. Thus, Doe argued, the real question presented in the present posture of the case was not pressed by petitioner in the lower courts and in any event is academic.

Doe also filed a timely cross-petition, No. 86-1442, seeking review of whether he is entitled under any of the grounds discussed above to a statement of reasons for the Director's determination to discharge him. The Court has not yet acted on that petition.

SUMMARY OF ARGUMENT

I. In the courts below, the government expressly stated that it did not contend that section 102(c) precludes review of claims that the Director's termination decisions violate the Constitution or exceed his statutory authority. (Pet. App. 17a.) Under the court of appeals' decision, the only claim remaining for Doe to litigate in this case is the question of whether the Director's decision to fire him because of a policy barring all homosexuals violated

Doe's constitutional rights. Accordingly, the question presented by the government's petition—whether review of respondent's only remaining claim is precluded—was never litigated below. Under these circumstances, the Court should decline to decide this question and either affirm the judgment below or dismiss the petition as improvidently granted.

II. A. Section 102(c) of the National Security Act of 1947 is not a statute that precludes judicial review. 5 U.S.C. § 701(a)(1). Nothing in its text or legislative history affords even a fragile basis for overcoming the strong presumption in favor of review. Moreover, in *Service* v. *Dulles*, 354 U.S. 363 (1957), this Court conducted judicial review of an agency discharge action pursuant to a statute that was virtually identical to section 102(c). Unable to find any support for his preclusion argument in the language or legislative history of section 102(c), and confounded by this Court's decision in *Service*, petitioner relies on what he characterizes as the historical context and the structure and purposes of the statute. On examination, these attenuated interpretive sources fail to justify reading into the statute the preclusion of review that is missing from its text. In the end, petitioner's argument rests on policy arguments that his personnel decisions ought to be exempt from judicial review because of the sensitive nature of the CIA's work. But petitioner can point to no evidence that Congress has adopted this view.

B. Nor does section 102(c) so far commit the agency action of firing CIA employees to agency discretion as to foreclose review of an exercise of discretion under the judicial review provisions of the Administrative Procedure Act. 5 U.S.C. § 701(a)(2). Petitioner scarcely argues the contrary, concentrating instead on the unsupportable preclusion of review argument. Section 102(c) clearly does establish a standard for the Director's personnel actions—he may terminate CIA employees only when "he shall deem such termination necessary or advisable in the interests of the United States." Moreover, apart from this statutory standard that channels the Director's discretion, we deal here with a constitutional claim. The APA declares that its judicial review provisions apply "except *to the extent* that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (emphasis added). The exception for commitment to agency discretion cannot fairly be read as encompassing substantial constitutional claims because all agency discretion is to that "extent" confined; no agency can by law have discretion to violate constitutional rights.

C. Petitioner's position is also undercut by the fact that the CIA regularly, without jurisdictional objection, defends challenges to its personnel decisions pursuant to the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 42 U.S.C. § 2000e-16. If petitioner were correct in his argument that section 102(c) precludes judicial review "notwithstanding any other provision of law," then Title VII suits would be barred as well. Yet there is no indication that either Congress or petitioner himself believes this to be true.

III. On a correct reading of section 102(c) and 5 U.S.C. § 701(a), the Court need not reach the question of whether Congress can foreclose United States courts from considering substantial constitutional issues that go to the legality of a government agency's conduct—the issue, for example, whether jobs in the CIA can be reserved for members of a particular race, sex, religion, or political party. Even if the issue of statutory construction were closer, the Court would be thoroughly justified in resolving it in favor of review of constitutional issues to avoid the serious questions concerning whether such review can constitutionally be prohibited. If the issue is reached, we submit that its proper resolution is a decision that Congress cannot foreclose all judicial review of a substantial constitutional claim, including the claim that, after the decision below, remains alive in respondent's case.

ARGUMENT

I. BECAUSE PETITIONER CONCEDED BELOW THAT SECTION 102(c) DOES NOT PRECLUDE JUDICIAL REVIEW OF CONSTITUTIONAL CLAIMS, THE COURT SHOULD DECLINE TO CONSIDER THAT ISSUE NOW

The only question now before the Court is whether judicial review can be had of Doe's claim that his constitutional rights were violated by a CIA policy of not employing homosexuals. No other claim is available to him on the court of appeals' remand to the district court. The court of appeals reviewed the Director's decision for other asserted legal defects, but it rejected all of these claims and, in doing so, applied a standard of review so deferential as to amount practically to no review at all.

Petitioner's present contention that Doe is precluded from litigating his constitutional claims is directly contrary to the position he took in the courts below. During oral argument in the district court on the cross-motions for summary judgment, government counsel repeatedly stated that section 102(c) does not insulate the Director's personnel decisions from review for constitutional error.[6] Similarly, in the court of appeals "[g]overnment counsel conceded at oral argument that the agency was not prepared to say that constitutional claims, or even claims that the Director acted in excess of his or her statutory authority, are precluded from review." (Pet. App. 17a.)

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[6] February 25, 1983 Transcript at 37 ("The statutes applicable to the Director's authority certainly do not give him the power to act unconstitutionally . . ."), 38 ("Now it would be possible I suppose for a particular plaintiff to raise a claim which would introduce constitutional issues that would have to be resolved by the Court"), 51 ("Your Honor, we make no assertion and the Director makes no assertion that the statute under which he acted in this case insulates him from the Constitution").

Given his stance in the courts below, petitioner should not be permitted to contend in this Court for the first time that section 102(c) bars review of Doe's constitutional claims. A party is not permitted to raise on appeal issues that were not litigated below. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). Not only did petitioner fail to assert in the courts below that review of Doe's constitutional claims was precluded, he specifically stated in both courts that he was not advancing such an argument. Thus, no injustice results from prohibiting petitioner from raising this issue on appeal. *Singleton* v. *Wulff*, 428 U.S. at 121. If the Court is not disposed to take up the questions presented by respondent's cross-petition, it should either affirm the judgment of the court of appeals—which in practical terms authorizes no broader scope of review than petitioner acquiesced in below—or dismiss the petition as improvidently granted.

II. SECTION 102(c) OF THE NATIONAL SECURITY ACT OF 1947 DOES NOT PRECLUDE JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT OF PETITIONER'S DECISIONS TO DISCHARGE EMPLOYEES

The judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, are not applicable by their own terms "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Petitioner contends that his decisions to terminate officers and employees of the CIA pursuant to section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c), are exempt from judicial review under the APA because section 102(c) is a statute that both precludes judicial review and commits termination decisions to petitioner's

absolute discretion. As we demonstrate below, neither contention has any merit.[7]

A. Section 102(c) Does Not Preclude Judicial Review

The Court has recently summarized the criteria for determining whether a statute precludes judicial review in *Bowen* v. *Michigan Academy of Family Physicians*, 106 S. Ct. 2133 (1986). "We begin with the strong presumption that Congress intends judicial review of administrative action." *Id.* at 2135. This presumption has its roots in Chief Justice Marshall's insistence that "'[t]he very essence of civil liberty certainly consists in

[7] Respondent respectfully submits that in the present posture of this case, petitioner's argument lacks any relevance to this litigation. The court of appeals has remanded the case for the sole purpose of determining whether the CIA has a policy of barring employment of all homosexuals and, if so, whether that policy violates respondent's constitutional rights. If respondent has a colorable constitutional claim, he has a federal question that he can litigate in the federal courts, 28 U.S.C. § 1331, and he does not depend on the APA to confer a right of judicial review. *See Davis* v. *Passman*, 442 U.S. 228, 234-44 (1979). In response to this point, petitioner argues in Point II of his brief that if section 102(c) meets the criteria of 5 U.S.C. § 701(a), then even a constitutional claim is barred by the doctrine of sovereign immunity because the waiver of immunity in the 1976 amendments to the APA, 5 U.S.C. § 702, is "subject to the other limitations imposed by the APA, such as the preclusion of judicial review provisions of 5 U.S.C. § 701(a)(1) and (2)." (Pet. Br. 30-31). This argument is without merit because sovereign immunity has never been thought to bar actions seeking to restrain federal officials from unconstitutional conduct, *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 688-90 (1949), and surely Congress in amending section 702 in 1976 to eliminate the defense of sovereign immunity in nonstatutory review cases did not mean to erect new barriers of sovereign immunity where none had existed before. Accordingly, the availability of section 702's waiver of immunity is immaterial to Doe's constitutional claim. Thus, the question presented by petitioner concerning the availability of review under the APA is merely academic. On the other hand, the issue of the availability of APA review might be a live one if the Court granted Doe's cross-petition in No. 86-1442 and found it necessary to rely on the APA review provisions to reach the question of whether Doe is entitled to the nonconstitutional procedural portections he seeks.

the right of every individual to claim the protection of the laws.'" *Id.* at 2136, *citing Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

More specifically, the committees of Congress that drafted the APA made clear that judicial review was to be the rule and that exceptions would be recognized only on the clearest showing of congressional intent. *Michigan Academy*, 106 S. Ct. at 2136, *citing* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945); H. R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946). The House Committee, for example, stated that "[t]o preclude judicial review under this bill, a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it." *Id.* As the Court pointed out in *Michigan Academy*, "[t]his standard has been invoked time and again when considerng whether" an agency head "has discharged 'the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision.'" 106 S. Ct. at 2136, *citing Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (footnote omitted).

Drawing on its earlier decision in *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984), the Court in *Michigan Academy* listed the sources that may provide clear and convincing evidence to overcome the presumption in favor of review. 106 S. Ct. at 2137. First, of course, is specific language in the statute itself. *Community Nutrition Institute*, 467 U.S. at 349. Second is "specific legislative history that is a reliable indicator of congressional intent" to preclude review. *Id.* Third, the requisite congressional intent "may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it." *Id.* Finally, "inferences of intent" to preclude review may be "drawn from the statutory scheme as a whole," *id.*, but such intent must be "'fairly discernible in the detail of the legislative scheme.'" *Id.* at 351, *quoting Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S.

150, 157 (1970). Contrary to petitioner's assertions, none of these indicia of congressional intent to preclude judicial review are present with respect to section 102(c), as we demonstrate below.

1. *Statutory Text*

As enacted in 1947, section 102(c) provided:

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555) [the Lloyd-LaFollette Act], or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

61 Stat. 498.[8]

This language, of course, says nothing at all about judicial review, and thus the text itself is of no aid to petitioner. Indeed, although several heavily footnoted pages follow the subheading "The statutory text" (Pet. Br. 11-18), petitioner makes no textual argument. Only a short introductory paragraph in the "statutory text" section of the brief actually concerns the text. (*Id.* at 11.) And that one paragraph is a banality, a statement of what cannot be denied: that section 102(c) "grants the Director broad discretion to remove an employee whenever he deems it necessary or advisable in the public interest." (*Id.*) Petitioner does not rely on

[8] The statute in its present form (Pet. Br. 2) substitutes citation to the Civil Service Reform Act of 1978, 5 U.S.C. § 7501, for the citation to the Lloyd-LaFollette Act in the "notwithstanding" clause and substitutes the Director of the Office of Personnel Management for the United States Civil Service Commission at the end of the section. 50 U.S.C. § 403(c).

text but, as the following paragraph of the brief says, on "[t]he historical context in which Section 102(c) was enacted" to show that, in addition to being broadly discretionary, the Director's termination decision "is also final." (*Id.*) We shall deal with this "historical context" argument (Pet. Br. 11-13) and petitioner's other nontextual arguments below in appropriate order.

2. *Legislative History*

Several pages of petitioner's brief follow the subheading "The legislative history" (Pet. Br. 18-21), but all that is said there about what most people think of as legislative history—hearings, committee reports and floor debates—is that "[t]he legislative history of the National Security Act of 1947 does not specifically address the meaning of Section 102(c)." (Pet. Br. 20.) That description of the legislative history is accurate.

3. *Contemporaneous Judicial Construction*

Although petitioner relies on the court of appeals' decision in *Service* v. *Dulles*, 235 F.2d 215 (D.C. Cir. 1956), *rev'd*, 354 U.S. 363 (1957), this Court's decision in that case shows that language such as that used in section 102(c) does not preclude review. Petitioner correctly points out that the statute at issue in *Service*, the "McCarran Rider," is nearly identical to section 102(c).[9]

[9] The McCarran Rider, which was enacted annually between 1947 and 1953, provided:

> Notwithstanding the provisions of [the Lloyd-LaFollette Act], or the provisions of any other law, the Secretary of State may, in his absolute discretion, [during the current fiscal year], terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

Department of State Appropriation Act, 1947, ch. 541, Tit. I, 60 Stat. 458; Department of State Appropriation Act, 1948, ch. 211, Tit. I, 61 Stat. 288; Department of State Appropriation Act, 1949, ch. 400, Tit. I, § 104, 62 Stat. 315; Department of State Appropria-

The Secretary of State discharged Service from the Foreign Service pursuant to the McCarran Rider, and Service sought judicial review. The court of appeals did not hold that the McCarran Rider precluded judicial review, but rather that the court's function under the statute was limited to reviewing whether the Secretary had followed the procedural requirements of the statute. 235 F.2d at 218. In the court of appeals' view, the only procedure required was for the Secretary to make the determination that termination of Service's employment was necessary or advisable in the interests of the United States. *Id.* Since the Secretary had made that determination, the court held that its inquiry was at an end. Most limited review to be sure, but nonetheless review—that is the lesson of the decision of the court of appeals.[10]

This Court reversed that decision and accorded much wider review of the Secretary's action. Service contended that the State Department had promulgated regulations that were applicable to discharges under the McCarran Rider, and that the Secretary was bound to follow these regulations. 354 U.S. at 372. The Court found first that the regulations applied to Service's case. *Id.* at 373-81.

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tion Act, 1950, ch. 354, Tit. I, § 104, 63 Stat. 456; General Appropriation Act, 1951, ch. 896,, § 1213, 64 Stat. 768; Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1952, ch. 533, Tit. I, § 102, 65 Stat. 581; Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1953, ch. 651, Tit. I, § 103, 66 Stat. 555.

[10] Like the court of appeals opinion in *Service*, the other appellate decisions cited by petitioner for the proposition that section 102(c) and similar statutes preclude review (Pet. Br. 14-15 n.12), in fact provided limited review. *Torpats* v. *McCone*, 300 F.2d 914 (D.C. Cir.), *cert. denied*, 371 U.S. 876 (1962); *Scher* v. *Weeks*, 231 F.2d 494 (D.C. Cir.), *cert. denied*, 351 U.S. 973 (1956); *Rhodes* v. *United States*, 196 Ct. Cl. 31, *cert. denied*, 371 U.S. 821 (1962). Only the decision in *Baker* v. *United States*, 224 Ct. Cl. 760 (1980), *cert. denied*, 450 U.S. 1040 (1981), appears to support petitioner's position, but *Baker* is inconsistent with this Court's decision interpreting similar language in *Service* v. *Dulles*.

The Court then engaged in a searching inquiry as to whether the Secretary had followed these regulations. *Id.* at 382-88.[11] Upon determining that the Secretary had failed to follow the regulations, the Court reversed the judgment of the court of appeals and remanded the case for further proceedings consistent with the regulations. *Id.* at 389.

Petitioner's position in this case is directly at odds with the result in *Service*. If the language of section 102(c) precludes judicial review, then the virtually identical language of the McCarran Rider would also have precluded review, and the Court would not have examined in detail whether the Secretary had followed his own regulations. The result in *Service* therefore supports respondent's position. Petitioner's invocation of the court of appeals' limited review decision as authority on his side is mysterious enough. But we are at an utter loss to understand how petitioner can say, as he does, that this Court's reversal of the court of appeals' decision was on other grounds (Pet. Br. 14) when the reversal called for broader, meaningful review of a discharge decision and the issue in Doe's case is whether an analogous statute allows review at all.

Furthermore, Congress' lack of reaction to *Service* refutes petitioner's argument that Congress intended to preclude judicial review of the Director's discharge decisions. Having seen in *Service* that the language of the McCarran Rider did not protect the Secretary of State from judicial review, Congress would have acted to strengthen the identical language of section 102(c) if it had intended to preclude review of the Director's termination decisions. The fact that Congress took no such action is a significant obstacle to petitioner carrying his

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[11] The parties were in dispute as to which of two sets of regulations were applicable. 384 U.S. at 382. Rather than resolve this question, the Court examined both and determined that both had been violated.

heavy burden of persuasion that Congress intended the language of secton 102(c) to preclude judicial review.

4. *Other Considerations*

Finding no support in either the text or the secondary sources usually considered most authoritative, and confronted with a decision of this Court that shows that language such as that used in section 102(c) does not preclude review, petitioner rests his argument on a hodge-podge of less direct and less reliable indicators of congressional intent: the "historical context," (Pet. Br. 11-13, 18-20); statements in congressional reports on subsequent legislation (Pet. Br. 13); the structure and objectives of the National Security Act of 1947 (Pet. Br. 21-24); statutes dealing with agencies other than the CIA (Pet. Br. 19-20, 24-27); and policy arguments that might support congressional preclusion of judicial review, although there is no evidence that Congress either considered or accepted these arguments (Pet. Br. 16-17, 23). All of these arguments are either unpersuasive or in fact support the conclusion that section 102(c) does not preclude judicial review.

a. *Historical Context*

Petitioner asserts that the "historical context" in which section 102(c) was enacted shows that the Director's personnel decisions were meant to be unreviewable, even though section 102(c) says nothing of the sort. (Pet. Br. 11.) The context asserted by petitioner is the state of the law of judicial review of government employee discharges in 1947. The government says flatly that "[i]n 1947, federal employees could not obtain judicial review of their removal." (Pet. Br. 11-12.) That is a bold statement, given the fact that section 10 of the Administrative Procedure Act was enacted in 1946. True enough, as petitioner says, the Lloyd-LaFollette Act, 5 U.S.C. § 652 (1940), and the Veterans Preference Act of 1944, 5 U.S.C. § 863 (1946), did not provide for judicial review

of personnel decisions. But section 10 supplied that omission. If that was not evident by 1947, it was only because it took time for litigants and courts to explore the full implications of section 10 for reviewability of agency actions and because of the lingering notion that government employment was a privilege and therefore not entitled to judicial protection. *E.g.*, *Bailey* v. *Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951). *See generally* Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 U. Va. L. Rev. 196, 199-202 (1973); Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 Nw. U.L.Rev. 287, 307-28 (1968).

There is in any event no logic to petitioner's appeal to historical context. The Lloyd-LaFollette Act and the Veterans Preference Act established procedures that must be followed in discharging non-probationary civil servants and veterans and substantive standards for discharges. Section 102(c) says that, notwithstanding the provisions of Lloyd-LaFollette or of any other law (including the Veterans Preference Act), the Director of Central Intelligence may terminate CIA employees in his discretion if he makes a determination based on a different substantive standard: whether the discharge is necessary or advisable in the interests of the United States. Petitioner says that section 102(c) thereby "abolished" the "limited restrictions on the removal power" established by the two earlier statutes "and thus made even clearer that judicial review was unavailable as to such actions." (Pet. Br. 12-13.)

That assertion is a *non sequitur* even if one accepts that "limited restrictions on the removal power" were "abolished" and not just changed to fit the circumstances of the CIA. As we have seen, if discharges of government employees were not judicially reviewable in 1947, it was not because existing statutes placed only limited restrictions on the agencies' removal powers. It was because of hard-dying concepts, which can now be seen

to have been in their death throes in 1947, of privilege versus right and of the government's freedom as an employer from restraints that limit it in its other capacities. Thus, it is quite irrelevant to the reviewability of his personnel actions that section 102(c) told the Director that he could disregard what would otherwise have been restraints imposed by existing personnel law on his discretion. The "notwithstanding" clause of section 102 (c) said nothing and implied nothing about the power of courts to review exercises of the Director's authority over his employees.

Another appeal by petitioner to this same "historical context" suffers from a similar want of logic. Petitioner says that "[a] presumption of reviewability would be peculiar in the context of removals from federal employment, since at the time the statute was enacted removals were not subject to judicial review." (Pet. Br. 16.) But the whole point is that as our understanding of section 10 of the APA, of the demands of due process, and of the emptiness of the right-privilege distinction grew, the presumption of reviewability arose and applied to decisions under the Lloyd-LaFollette Act and the Veterans Preference Act previously not thought reviewable. There is no reason in the text or history of section 102(c) that the presumption should not apply as well to decisions made under its authority.

Certainly by the late 1950's it was apparent that government employees could obtain judicial review of discharge decisions. First, cases such as *Service* v. *Dulles*, 354 U.S. 363, established that federal courts have authority to review claims by discharged employees that the agency failed to follow its own regulations. *See Sampson* v. *Murray*, 415 U.S. 61, 71 (1974). Second, cases that expanded the coverage of the due process clause provided government employees at both the state and federal levels with an opportunity to obtain judicial review on constitutional grounds of decisions to fire them. *E.g.*, *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

The change in the landscape of judicial review available to discharged employees is vividly demonstrated by contrasting statements of the Court of Appeals for the District of Columbia Circuit. In 1950, that court wrote that "[i]n terms the due process clause does not apply to the holding of a Government office." *Bailey* v. *Richardson*, 182 F.2d at 57. Nineteen years later, the same court wrote that "[t]he Government's obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees: it forbids all dismissals which are arbitrary and capricious." *Norton* v. *Macy*, 417 F.2d 1161, 1164 (D.C. Cir. 1969) (footnote omitted).

That Congress took no action to protect the CIA from the expanding causes of action available to discharged federal employees shows that Congress never intended to insulate the Agency from judicial review. There is no evidence whatsoever that Congress intended to exempt the CIA from section 10 of the APA in 1947. While perhaps only a far-sighted lawyer would have foreseen the implications of section 10 within the first year of its enactment, Congress still took no action to protect the CIA from judicial review as the availability of such review became manifest.

b. *Other Statutes*

In contrast to Congress' failure to enact any statute that clearly exempts the Director's termination decisions from judicial review, Congress has enacted such statutes with respect to other intelligence agencies. For example, in authorizing the Secretary of Defense to terminate civilian intelligence officers and employees of the military departments and the Defense Intelligence Agency, Congress provided that such decisions are "final and may not be appealed or reviewed outside the Department of Defense." 10 U.S.C. §§ 1590(e)(1) and 1604(e).[12]

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[12] The statute authorizing the Secretary of Defense to terminate employees of the National Security Agency provides that the Secre-

These statutes show that Congress knows how to draft a statute that clearly purports to preclude review of decisions to discharge intelligence officials, insofar as the Constitution allows such preclusion. *See* 2A *Sutherland Statutory Construction* § 51.02 at 454 (4th ed. 1984) ("where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed"). But in arguing that section 102(c) "must be read in conjunction with these other statutes" (Pet. Br. 26), petitioner fails to recognize that they plainly purport to preclude judicial review while section 102(c) does not.

Petitioner finds it "quite odd" (Pet. Br. 27) that Congress has sought to immunize from judicial review discharge decisions of the Secretary of Defense and not those of the Director of Central Intelligence. But petitioner must seek relief from that anomaly from Congress rather than from this Court. "If there is a gap in the law, the right and the duty, if any, to fill it do not devolve upon the courts." *United States* v. *Laub*, 385 U.S. 475, 486 (1967).

Petitioner also cites thirteen statutes enacted between 1940 and 1953 that authorize summary dismissal of federal employees in the Departments of State, Defense, and Commerce and the Atomic Energy Commission. (Pet. Br.

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tary's determination is final. 50 U.S.C. § 833. However, that statute, unlike the statutes dealing with the military departments and the Defense Intelligence Agency, does not state that the Secretary's determinations may not be appealed or reviewed outside the Department of Defense. Two of the three committee reports on this statute, however, do state that the Secretary's determinations are not subject to judicial review. H.R. Rep. No. 108, 88th Cong., 1st Sess. 5 (1963); H.R. Rep. No. 2120, 87th Cong., 2d Sess. 4 (1962). Thus the NSA statute, while showing more evidence of an intent to preclude review than section 102(c), is not as clear and unambiguous as the DIA and military department statutes. All of these Department of Defense statutes are printed in Appendix A to Petitioner's Brief.

19).[13] Petitioner contends that these "contemporaneous" statutes giving agency heads "the final say" on discharge decisions "offer substantial evidence that Congress intended" the Director's removal decisions to be exempt from judicial review. (Pet. Br. 20.)

If, indeed, any of these statutes did preclude judicial review of discharge decisions, the logical argument based on them would not be the one petitioner advances, but rather the argument we have just made in respect of the Defense Department discharge statutes—that the presence in those statutes of the clear preclusion of review language absent from section 102(c) is what is significant. But in fact, like section 102(c), none of the cited statutes explicitly precludes judicial review. To the extent these statutes give agency heads a "final say" on discharge decisions (Pet. Br. 20), they preclude review by the Civil Service Commission under the Lloyd-LaFollette Act rather than judicial review under the APA. Because of their textual neutrality on the question of preclusion of review, these statutes on their face add nothing to petitioner's argument.

Moreover, seven of the cited statutes are the annual versions of the McCarran Rider that were passed between 1947 and 1953, *see* n.9, *supra*, and none of the other statutes offers any more evidence of intent to preclude judicial review than does the McCarran Rider.[14] As we

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[13] The statutes are cited in Pet. Br. 19-20 n.15.

[14] Three of the statutes are worded identically to the McCarran Rider except that they apply to the Department of Commerce rather than to the Department of State. General Appropriation Act, 1951, ch. 896, § 1213, 64 Stat. 768; Departments of State, Justice, Commerce and the Judiciary Appropriation Act, 1952, ch. 533, Tit. III, § 304, 65 Stat. 594; Departments of State, Justice, Commerce and the Judiciary Appropriation Act, 1953, ch. 651, Tit. III, § 304, 66 Stat. 567. Another is worded closely to the McCarran Rider and authorizes a number of department heads to suspend and terminate employees in their "absolute discretion and when deemed necessary in the interests of national security," notwithstanding the Lloyd-LaFollette Act. Act of August 26, 1950, ch. 803, § 1, 64 Stat. 476, 5 U.S.C. § 7532. Two more of the statutes

have seen, this Court's decision in *Service* v. *Dulles* shows that language such as that used in the McCarran Rider—and also in section 102(c)—does not preclude judicial review. Furthermore, in *Cole* v. *Young*, 351 U.S. 536 (1956), the Court reviewed the question of whether an agency head had applied the prescribed standard under one of the statutes cited by petitioner. Act of August 26, 1950, 5 U.S.C. § 7532. Accordingly, petitioner's contention that these thirteen statutes somehow support the inference that Congress intended section 102(c) to preclude judicial review is wholly without merit.

c. *Subsequent Committee Reports*

Petitioner also contends that the Court should find that the Congress that passed the National Security Act of 1947 intended to preclude judicial review because committee reports issued in subsequent Congresses have so interpreted the 1947 Act. In support of this proposition, petitioner cites five committee reports. (Pet. Br. 13.) In fact, only one of these reports actually says that the Director's termination decisions are exempt from judicial review, and that report mistakenly asserts that "courts have uniformly held" that language such as that in section 102(c) confers authority that "is not subject to review, judicially or otherwise." S. Rep. No. 98-77, 98th

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authorize "immediate removal" of civil service employees of the War and Navy Departments and the Coast Guard, "when in the opinion of the Secretary concerned [such removal is] warranted by the demands of national security," notwithstanding the Lloyd-LaFollette Act. Act of June 28, 1940, ch. 440, § 6, 54 Stat. 679; Act of Dec. 17, 1942, ch. 739, § 3, 56 Stat. 1053. Another of the cited statutes vests this same authority in the then newly created Secretaries of Defense and the Air Force. National Military Establishment Appropriation Act, 1950, ch. 787, Title VI, § 630, 63 Stat. 1023. The final statute cited by petitioner provides that the Atomic Energy Commission shall follow the civil-service laws except to the extent it deems necessary to the discharge of its responsibilities and that the Commission "shall make adequate provision for administrative review of any determination to dismiss any employee." Atomic Energy Act of 1946, ch. 724, § 12(a)(4), 60 Stat. 771.

Cong., 1st Sess. 7 (1983). As we have seen, the courts have not so held.

Two of the reports, which deal with the statute authorizing the Secretary of Defense to terminate employees of the National Security Agency, 50 U.S.C. § 833, merely say that section 102(c) grants authority "similar" to that in the NSA statute, without suggesting that section 102(c) precludes judicial review, as the reports say the differently worded NSA statute does. H. R. Rep. No. 108, 88th Cong., 1st Sess. 4-5 (1963); H. R. Rep. No. 2120, 87th Cong., 2d Sess. 4 (1962). A third report on the NSA statute states that the National Security Act of 1947 grants the "same power" of summary dismissal to the Director that the NSA statute grants to the Secretary of Defense, but says nothing about judicial review. S. Rep. No. 926, 88th Cong., 2d Sess. 2 (1964). The final cited report makes no mention at all of judicial review of termination decisions under section 102(c). S. Rep. No. 98-481, 98th Cong., 2d Sess. 7-11 (1984).

Even if these reports said what petitioner says they do—and they do not—this Court has "oft-repeated" the "warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 117 (1980), *quoting United States* v. *Price*, 361 U.S. 304, 313 (1960). In *GTE Sylvania*, the Court noted that "[a] mere statement in a conference report . . . as to what the Committee believes an earlier statute meant" is entitled to little weight. 447 U.S. at 118 n.13. Such "less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment" and do not "bear strong indicia of reliability." *Id.*

Thus, the Court in *GTE Sylvania*, in interpreting the statute at issue there, refused to be guided by statements in a conference committee report on subsequently enacted legislation. *Id.* at 118-19. Similarly, in *Oscar Mayer &*

Co. v. *Evans*, 441 U.S. 750, 758 (1979), the Court refused to follow an interpretation that appeared in a committee report written eleven years after the statute in question had been enacted. "[S]uch '[l]egislative observations . . . are in no sense part of the legislative history.'" *Id., quoting United Airlines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977). The reports cited here by petitioner stand on no better footing and are entitled to no greater weight than those that the Court declined to follow in *GTE Sylvania* and *Oscar Mayer*.

d. *Structure and Objectives of the Act*

Petitioner also argues that the structure and objectives of the National Security Act of 1947 support a conclusion that Congress meant section 102(c) to preclude judicial review. (Pet. Br. 21-24.) This argument is based on the statements in *Block* v. *Community Nutrition Institute* that intent to preclude judicial review may be inferred from the detail of a statutory scheme as a whole. 467 U.S. at 349, 351.

At the outset, we submit that petitioner has made an unwarranted leap from *Community Nutrition Institute* to this case. In that case the Court considered an extraordinarily complex rulemaking scheme under which the Secretary of Agriculture set milk marketing prices. Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* In the detail of that intricate scheme, the Court found an intent to permit milk producers and handlers, but not milk consumers, to seek judicial review of the Secretary's decisions. In contrast to the detailed regulatory legislation considered in *Community Nutrition Institute*, the National Security Act of 1947 is broad organic legislation that was concerned with reorganizing the government's national defense establishment. In addition to creating the CIA, the Act also established the National Security Council, the Department of Defense, and the Department of the Air Force, separating that service from the Department of the Army.

This sweeping type of legislation is so fundamentally different from a detailed regulatory scheme for setting milk prices that the Court's comments in *Community Nutrition Institute* about inferring an intent to preclude judicial review are simply inapplicable to the National Security Act of 1947.

Nonetheless, if the structure and objectives of the 1947 Act are examined, they do not support petitioner's position that they demonstrate a congressional intent to preclude judicial review of the Director's termination decisions. This argument rests on the observation that in several respects the Act authorizes the Director to operate in secret—for example, to protect intelligence sources and methods from unauthorized disclosure,[15] to keep the identities of CIA personnel secret,[16] and to fund his operations through secret means that are exempt from normal accounting procedures for federal funds.[17] But, as with many of petitioner's arguments in this case, the conclusion does not follow from the premise: because Congress endowed the Director with authority to conduct much of his work in secret, it does not follow that Congress also exempted him from judicial review of his termination decisions.

In making this argument, petitioner relies heavily on the decision in *CIA* v. *Sims*, 471 U.S. 159 (1985), where the Court considered the proper definition of the term "intelligence sources" in section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3). *Sims* arose under the Freedom of Information Act, 5 U.S.C. § 552, which exempts from its general requirement of disclosure matters that are exempted from disclosure

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[15] Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3).

[16] Section 6 of the Central Intelligence Act of 1949, 50 U.S.C. 403g.

[17] Section 8(b) of the Central Intelligence Act of 1949, 50 U.S.C. § 403j(b).

by other statutes. 5 U.S.C. § 552(b)(3). The case therefore presented the question of the proper construction of section 102(d)(3), which makes the Director of Central Intelligence "responsible for protecting intelligence sources and methods from unauthorized disclosure." In holding that the court of appeals had adopted too narrow a definition, this Court discussed both the legislative history and the structure and objectives of the National Security Act of 1947.

What is significant about the *Sims* decision and section 102(d)(3) for purposes of deciding whether section 102(c) precludes judicial review is that, although section 102(d)(3) provides a broad exemption from disclosure, the National Security Act of 1947 does not exempt the CIA from judicial review under the FOIA. If petitioner were correct in his contention that the structure and objectives of the Act show a congressional intent to preclude review of termination decisions under section 102(c), then one would also expect that Congress would have precluded judicial review under the FOIA, the Privacy Act of 1974,[18] the discovery provisions of the Federal Rules of Civil Procedure, or any other statute that authorizes access to CIA information. But Congress did not do so in 1947, and it has not done so since, despite the fact that the CIA is frequently engaged in litigation over access to its records. Indeed, in 1984, Congress enacted the Central Intelligence Agency Information Act, 50 U.S.C. § 701, which amends the National Security Act of 1947 and reaffirms the CIA's amenability to judicial review under the FOIA. H. R. Rep. No. 98-726, Pt. I, 98th Cong., 2d Sess. 32-33 (1984) ("*de novo* judicial review is essential to ensure effective CIA implementation of the [FOIA] and to ensure public confidence in the implementation of the Act").[19]

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[18] 5 U.S.C. § 552a.

[19] The statute exempts from the operation of the FOIA "operational files," 50 U.S.C. § 701(a), a term that is carefully defined in the statute to apply to only a limited category of exceptionally sensitive documents. 50 U.S.C. § 701(b). However, Congress also determined that even these sensitive operational files will continue to be subject to the FOIA when they relate to (1) the person making the request, (2) a covert operation the existence of which is no longer exempt from disclosure, or (3) a matter that has been the subject of an investigation by Congress, the Department of Justice, or the CIA itself for "any impropriety or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity." 50 U.S.C. § 701(c). Furthermore, Congress also determined that requests for CIA records will continue to be subject to the *de novo* judicial review provision of the FOIA with minor modifications in the procedures to be followed in such litigation. 50 U.S.C. § 701(f).

Both the *Sims* decision and the 1984 Central Intelligence Information Act demonstrate that judicial review is available for decisions to withhold CIA information under the FOIA. Since Congress has not insulated the Agency from judicial review of FOIA requests, there is no reason to believe that judicial review of termination decisions is inconsistent with the structure and objectives of the Act as a whole.

e. *Policy Arguments Not Considered By Congress*

Unable to find any evidence that Congress intended to preclude judicial review of his discharge decisions in the text of section 102(c), its legislative history, or any of the other conceivably relevant sources of interpretive guidance, petitioner in the end rests his position on policy arguments that, if made to Congress, might persuade legislators to exempt the Director's termination decisions from judicial review. He points out that CIA employees have access to sensitive information and that the Director should be able to move swiftly to remove employees who threaten to compromise security. (Pet. Br. 22-23.) Petitioner further argues that courts are ill-suited to review the Director's decisions. (Pet. Br. 16-17). Whatever

merit there may be to these arguments, there is simply no evidence that Congress either considered or adopted them in 1947 when it enacted section 102(c). As the court of appeals quite correctly noted, the inquiry under section 701(a)(1) of the APA "is limited to what *Congress* intended, not what the CIA finds preferable." (Pet. App. 13a, emphasis in original.)

B. The Director's Termination Decisions Are Not Committed To His Absolute Discretion

The bulk of petitioner's argument is devoted to demonstrating that section 102(c) is a statute that precludes judicial review, and he argues only briefly that review is precluded because his termination decisions are "agency action . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2). (Pet. Br. 11, 27-28.) That argument is based on the language in section 102(c) that authorizes the Director to terminate Agency employees "in his discretion." But the argument overlooks the additional language in the statute that this discretion may be exercised only when the Director "shall deem such termination necessary or advisable in the interests of the United States."

Section 701(a)(2) is a "very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), *quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). The Court recently has said that this exemption applies only when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," or, in other words, where "no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). For example, even where a statute authorizes an agency head to issue regulations "as he may deem proper," the Court

has held that the regulations are not so absolutely committed to his discretion that review is precluded. *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970).

By providing a standard under which the Director must exercise his discretion to terminate employees—"whenever he shall deem such termination necessary or advisable in the interests of the United States"—Congress has set a standard by which courts can conduct judicial review. As the court of appeals correctly ruled, the Director's discretion is broad and his decisions will be entitled to substantial deference by reviewing courts, but his discretion is not so absolute that review is precluded pursuant to section 701(a)(2). (Pet. App. 16a, 19a.)

Moreover, as we have pointed out, the only question remaining for litigation under the opinion of the court of appeals is whether Doe was discharged pursuant to a policy that violates his constitutional rights. Section 701(a)(2) precludes judicial review only "to the extent that . . . agency action is committed to agency discretion by law." As the court of appeals noted, no law can endow an agency with discretion to act unconstitutionally. (Pet. App. 16a-17a n.33.) Accordingly, section 102(c) cannot, in conjunction with section 701(a)(2), preclude review of Doe's constitutional claims.

C. The CIA's Amenability To Suit Under Federal Antidiscrimination Law Refutes Petitioner's Argument

A major embarrassment to petitioner's position, which he neglects to address, is that CIA personnel decisions are subject to judicial review for claims of race and sex discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 42 U.S.C. § 2000e-16. If petitioner were correct that section 102(c) precludes judicial review of his termination decisions "notwithstanding . . . the provisions of any other law," then the CIA would be exempt from Title VII—a result that, we submit, would astound Congress.

Moreover, the Agency's routine defense of Title VII suits in court—without making jurisdictional objections—belies the argument that the Director's employment decisions are exempt from judicial review. *E.g.*, *Brown* v. *Turner*, 490 F. Supp. 939 (D.D.C. 1980), *aff'd*, 659 F.2d 1199 (D.C. Cir. 1981); *Turbeville* v. *Casey*, 525 F. Supp. 1070 (D.D.C. 1981); *Weber* v. *Turner*, 92 F.R.D. 749 (D.D.C. 1981); *Neely* v. *CIA*, 27 Fair Empl. Cas. (BNA) 82 (D.D.C. 1981).

Congress' authorization of Title VII suits against the CIA also shows that Congress is willing to impose on the Agency the burdens from which petitioner asserts it must be free in suits like respondent's. Title VII suits against the CIA typically involve litigation over "issues of hiring, promotions, specialized training, overseas assignments, management opportunities, career advancement, bias in evaluations of performance and allegedly sexist and discriminatory attitudes of supervisors." *Turbeville* v. *Casey*, 525 F. Supp. at 1071. Doe's suit is less likely to probe these inner workings of the Agency than a Title VII action, and it certainly does not expose the CIA to any qualitatively different litigation than it already faces under Title VII. Since Congress has decided that the burdens imposed by Title VII suits do not present an undue threat to the CIA's operations, petitioner's arguments that Congress must have intended to insulate his termination decisions from judicial review lose what little force they might otherwise have.

III. PETITIONER HAS FAILED TO DEMONSTRATE THAT CONGRESS INTENDED TO PRECLUDE OR COULD PRECLUDE JUDICIAL REVIEW OF CONSTITUTIONAL CLAIMS

Petitioner contends (Pet. Br. 33-45) that section 102(c) precludes not only Doe's claim that the Director failed to follow the Agency's regulations and the procedural requirements of the APA, but also his claim that the Director's action violated Doe's substantive constitu-

tional rights.[20] This Court has never found that any act of Congress precludes review of claims that constitutional rights have been violated by government action. Where such arguments have been made, the Court has required clear and convincing evidence that Congress intended to bar judicial review and in each case found such evidence lacking. *E.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 776 (1975); *Johnson* v. *Robison*, 415 U.S. 361 (1974). The Court has also stated that if Congress were to enact a statute that clearly and unambiguously purported to preclude judicial review of constitutional claims, the statute would present serious constitutional questions. *Bowen* v. *Michigan Academy of Family Physicians*, 106 S. Ct. at 2141 n.12; *Johnson* v. *Robison*, 415 U.S. at 366.

Courts seek to construe statutes in a manner that avoids constitutional questions. *Johnson* v. *Robinson*, 415

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[20] Petitioner suggests that the court of appeals erred in holding that respondent has an arguable constitutional claim to litigate and that the decision in *Bowers* v. *Hardwick*, 106 S. Ct. 2841 (1986), forecloses any such claim. (Pet. Br. 27-28 n.23.) The Director expressly declined to present this issue for review in his petition for certiorari (Cert. Pet. 25 n.21), and therefore it would be inappropriate for this Court to decide it. Moreover, *Bowers* does not foreclose Doe's claims. That case held only that the Constitution does not confer a fundamental right on homosexuals to engage in sodomy, as explicitly defined by the statute at issue in that case, 106 S. Ct. at 2842 n.1, and that therefore the Constitution does not invalidate such laws. *Id.* at 2843. *Bowers* did not address Doe's claim that there is no rational basis for the Director's conclusion that Doe's homosexuality presents a security threat, or his equal protection claim that he has been treated more severely than heterosexual CIA employees who engage in premarital and extramarital sexual conduct. Moreover, *Bowers* did not address all of Doe's privacy claims. At the present stage of the litigation, the record reveals only that Doe has "engaged in homosexual activities since 1976." (J.A. 6.) There is no evidence that these activities include sodomy as defined by the criminal statute at issue in *Bowers*. Under all these circumstances, it would be inappropriate at this stage of the litigation for the Court to do other than assume that Doe has a colorable constitutional claim to litigate in the district court.

U.S. at 367. In this case there are ample grounds to avoid the difficult issues petitioner seeks to thrust on the Court. In both the district court and in the court of appeals, the government explicitly disclaimed any contention that section 102(c) bars review of constitutional claims. Accordingly, the issue of whether Congress could constitutionally foreclose judicial review of such claims never arose. As we have argued elsewhere (pp. 16-17, *supra*), that alone is a sufficient reason to decline consideration of petition's argument. *Singleton* v. *Wulff*, 428 U.S. at 120; *Youakim* v. *Miller*, 425 U.S. at 234. On the merits, there is no evidence at all, let alone clear and convincing evidence, that Congress intended section 102(c) to preclude judicial review of constitutional claims. If, however, the Court decides to confront the question of whether Congress can bar federal courts from reviewing claims that the executive branch has violated the constitutional rights of an individual, that extraordinary contention should be rejected for the reasons set forth below.

A. The Presumption of Reviewability Applies With Special Rigor Where Constitutional Claims Are Asserted

The requirement of "clear and convincing" evidence that Congress intended to preclude judicial review applies "in a particularly rigorous fashion when constitutional rights form the basis of the action over which judicial review is sought." *Bartlett* v. *Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987). *See Johnson* v. *Robison*, 415 U.S. at 373-74. This is because preclusion of review of constitutional claims is such an "extraordinary" restriction that the Court requires particularly strong evidence before it will "ascribe such an intent to Congress." *Weinberger* v. *Salfi*, 422 U.S. at 762. "[O]nly the clearest evocation of congressional intent to proscribe judicial review of constitutional claims will suffice to overcome the presumption that the Congress would not wish to court the constitutional dangers inherent in denying a forum in which to argue that government action has injured

interests that are protected by the Constitution." *Ungar* v. *Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981).

As demonstrated above, petitioner has failed to marshal sufficient evidence of congressional intent to preclude review to satisfy 5 U.S.C. § 701(a)(1). However, even assuming that petitioner has made an adequate showing that Congress intended section 102(c) to preclude review of nonconstitutional claims, petitioner still has not met the more stringent burden of demonstrating an intent to preclude review of constitutional claims.

B. Serious Constitutional Questions Would Be Raised By A Statute That Precluded Judicial Review Of A Constitutional Claim

The breadth of petitioner's position is staggering. His argument is that section 102(c) immunizes him from judicial review for constitutional error if he fires employees because of their race, sex, religion, political affiliation, or the color of their eyes. To say the least, enactment of a statute intended to have such an effect would raise serious constitutional questions about the validity of the statute. *Bowen* v. *Michigan Academy of Family Physicians*, 106 S.Ct. at 2141 n.12; *Johnson* v. *Robison*, 415 U.S. at 366-68. *See also Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 25-29 (1980); Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 921 n.113 (1984). Such a statute would not only deprive affected parties of due process of law, but would also threaten the courts' role as the final arbiters of the Constitution.[21]

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[21] These considerations apply whether the plaintiff challenges the constitutionality of a statute as in *Johnson* v. *Robison*, or, as here, unconstitutional implementation of a statute. *Cardenas* v. *Smith*, 733 F.2d 909, 918-19 (D.C. Cir. 1984); *Ungar* v. *Smith*,

The Court has held that "[w]hen dealing with constitutional rights," due process requires that "there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it." *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. at 77. Due process considerations also require that an agency not be permited to function as "an island entire of itself." Jaffee, *Judicial Control of Administrative Action* 327 (1965). "The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with . . . the ultimate guarantees associated with the Constitution." *Id.* Thus, on the rare occasions when the lower courts have been faced with the question, they have ruled that due process requires availability of a judicial forum for resolution of constitutional claims. *Bartlett* v. *Bowen*, 816 F.2d at 704-07; *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

The doctrine of separation of powers also requires that judicial review of Doe's constitutional claim be available. *Bartlett* v. *Bowen*, 816 F.2d at 703, 707; Redish, *supra*, at 24-34. At least since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, it has been clear that the Judiciary, not the Executive branch, is charged with ultimate responsibility for determining what the Constitution requires. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958). "Congress cannot employ its Article III power to . . . limit lower federal court jurisdiction in such a manner that improperly abridges the implied constitutional mandate of separation of powers." Redish, *supra*, at 29 (footnote omitted). At the very least, the separation of powers doctrine means that the CIA cannot be endowed with the power to pass on the constitutionality of its own actions.

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667 F.2d at 193; *Devine* v. *Cleland*, 616 F.2d 1080, 1084 (9th Cir. 1980); *Ralpho* v. *Bell*, 569 F.2d 607, 618, 620 (D.C. Cir. 1977).

Bartlett v. *Bowen*, 816 F.2d at 707. If the government's contention that section 102(c) precludes judicial review is correct, the CIA can claim immunity from judicial review of a policy requiring termination of black employees because they are black, female employees because they are female, or blonde employees because they are blonde—a result the court of appeals properly found unthinkable. (Pet. App. 16a.)

C. The National Security Context In Which Section 102(c) Operates Does Not Preclude Judicial Review

The government asserts that the "national security context in which section 102(c) operates" presents "extraordinary considerations justifying the denial of a judicial remedy" which "distinguish this case from the far broader and much debated issue of legislative restriction of federal court jurisdiction." (Pet. Br. 33-34). Even assuming that Congress intended section 102(c) to preclude judicial review of nonconstitutional claims—which it did not—the "national security context" does not justify departure from the principle discussed above that Congress cannot deprive a citizen of judicial review of claims that the executive branch has violated his constitutional rights. As the court of appeals noted (Pet. App. 16a, 24a), the special national security concerns presented by cases involving CIA employees can be accommodated by the degree of deference that courts accord decisions of the Director of Central Intelligence.

1. *National Security and Individual Liberties*

Petitioner asserts that since the Executive's authority over matters affecting the national security is broad, Congress can preclude judicial review of decisions affecting the national security. (Pet. Br. 35-37.) This argument, however, overlooks the fact that the constitutional rights of individual citizens are at stake here. Indeed, the Court has held that judicial review is especially necessary in cases where invasions of individual liberties are

justified on national security grounds. *United States* v. *United States District Court*, 407 U.S. 297 (1972). This heightened need for judicial review stems from "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security." *Mitchell* v. *Forsyth*, 472 U.S. 511, 523 (1985). Thus, courts must be particularly sensitive to claims that national security interests bar judicial review where a countervailing constitutional interest is at stake. *Zweibon* v. *Mitchell*, 516 F.2d 594, 623 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976). "It would indeed be ironic if, in the name of the national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States* v. *Robel*, 389 U.S. 258, 264 (1967).

Petitioner cites a number of cases containing broad language concerning the scope of the President's authority in matters relating to foreign relations and national defense. (Pet. Br. 35-37). However, even the broadest of these decisions recognizes that "like every other governmental power, [the Executive's power over foreign affairs] must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Moreover, these cases involve questions such as "the validity of treaties, the recognition of foreign powers, and the commitment of military forces." (Pet. Br. 37 n.32.) They do not involve consideration of a countervailing individual right in defining the appropriate limits on Executive authority, where judicial scrutiny is essential.

Petitioner also erroneously relies on cases upholding summary agency action to support its contention that section 102(c) is merely a "reasonable limitation of employee rights." (Pet. Br. 42). Citing cases such as *Cole* v. *Young*, 351 U.S. 536 (1956), the government asserts that "the Constitution is sufficiently flexible that it can accommodate the government's interest in national security areas." (Pet. Br. 42). This argument misses the

mark. The reason summary agency action was upheld in the instances cited by petitioner is precisely that judicial review of those agency actions was ultimately available. In each instance, the exercise of agency power that has the potential to violate constitutionally protected interests was checked by the availability of judicial review. *E.g.*, *Haig* v. *Agee*, 453 U.S. 280 (1981) (passport revocation); *Snepp* v. *United States*, 444 U.S. 507, 513 n.8 (1980) (prepublication review); *United States* v. *Marchetti*, 466 F.2d 1309, 1317 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (same). These cases uphold limited burdens on individual rights necessary to promote the national interest, but they do not support wholesale denial of judicial review that is necessary to contain those burdens within permissible bounds.

It is similarly inappropriate to suggest (Pet. Br. 44) that it is the function of the political process to check agency power. Under our system of government courts have the final say about what the Constitution requires. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) at 177. The courts must not be ousted by an overbroad definition of executive authority from their traditional Article III function of safeguarding individual rights.

2. *State Secrets Privilege*

Pointing to the burdens imposed on private litigants in cases where the government successfully invokes the state secrets privilege, the government asserts that there is nothing "extraordinary about foreclosing litigation that could require the government to disclose secrets potentially damaging to vital national security interests." (Pet. Br. 37.) This argument, however, overlooks the substantial difference between (1) a judicial determination in a particular case that the national interest requires nonproduction of information that is indispensable to the litigation of the case, and (2) the wholesale denial of a judicial forum for an entire class of cases.

The state secrets privilege, rather than precluding judicial review, calls for an exercise of the judicial function in the national security area, albeit with deference to the executive branch. As the Court explained in *United States* v. *Reynolds*, 345 U.S. 1, 8, 10 (1953), this evidentiary privilege will be sustained only when the court itself determines that the circumstances warrant the claim. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. While it is true that successful invocation of the privilege may result in dismissal of a lawsuit if plaintiff cannot establish his case without the privileged information, *e.g.*, *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984), the privilege has never been held to bar an action prior to a judicial determination that specific and necessary information must be withheld. Thus, none of the cases relied upon by the government stand for the proposition that the state secrets privilege precludes all judicial review of constitutional claims.[22]

Petitioner's reliance on *Totten* v. *United States*, 92 U.S. 105 (1875), to support its view that "public policy" bars Doe's suit is misplaced. That action involved a claim for money the government allegedly owed to a secret agent under a contract he had entered into with President Lincoln to conduct espionage behind Confederate lines during the Civil War. The Court ruled that by entering into this secret arrangement, the agent gave up his right to seek judicial enforcement of the contract. The holding that a party may contract away his right to judicial resolution of disputes over the amount of his compensation is obviously far removed from the holding

[22] In this case, the government has never asserted that litigation of Doe's constitutional claim threatens in any way to cause a disclosure injurious to the national security. However, even if the government could assert a legitimate need for the secrecy of certain information relating to the termination of Doe's employment, the proper solution would be assertion of the privilege with respect to the specific information sought to be protected.

petitioner seeks that a party may not obtain judicial review of constitutional claims. Even where CIA employees by contract agree to submit their writings for prepublication review by the Agency, the Agency's determinations are subject to judicial review. *Snepp* v. *United States*, 444 U.S. at 513 n.8. Indeed, judicial review has been found essential to the constitutional permissibility of such prior restraints. *United States* v. *Marchetti*, 466 F.2d at 1317.[23]

D. The Doctrine Of Sovereign Immunity Does Not Support Petitioner's Argument

The government also argues (Pet. Br. 41) that Congress could constitutionally have intended section 102(c) to bar judicial review of Doe's claim because his suit would be barred by the doctrine of sovereign immunity in the absence of any waiver by Congress. Petitioner appears to argue that since Doe could not bring a suit without Congress' permission, there is no constitutional impediment to Congress withdrawing that permission through a statute that precludes judicial review. This argument is fundamentally flawed because—as even petitioner recognizes (Pet. Br. 29 n.26)—sovereign immunity does not bar suits seeking to restrain federal officials

[23] The government's assertion (Pet. Br. 39-40 n.34) that section 102(c) was passed to remedy deficiencies in the protection afforded by the state secrets privilege to confidential government information is also without merit. Section 102(c) addresses only the Director's authority to discharge CIA employees. There is nothing in the statute or legislative history to suggest that section 102(c) was intended to remedy any perceived shortcomings in the protection afforded national security secrets by existing government privileges. To the extent that Congress augmented the Director's ability to keep matters concerning the CIA secret, it did so through provisions other than section 102(c). 50 U.S.C. §§ 403(d)(3) (authority to protect information relating to intelligence sources and methods) and 403g (authority to protect "the organization, functions, names, official titles, salaries, or number of personnel employed by the Agency").

from unconstitutional conduct. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949).

In *Larson*, the Court reiterated doctrine that dates back to *Ex parte Young*, 209 U.S. 123 (1908), so far as state officials are concerned, and to *Philadelphia* v. *Stimson*, 223 U.S. 605 (1912), as it relates to federal officials: actions taken by government officials in excess of constitutional or statutory authority are individual actions rather than those of the sovereign. 337 U.S. at 689. When an official is thus acting *ultra vires*, he "may be made the object of specific relief." *Id.* Thus, the holding in *Larson* plainly recognizes a "constitutional exception to the doctrine of sovereign immunity." *Id.* at 696. This "constitutional exception" is mandated by the due process and separation of powers concerns that would be raised if the doctrine of sovereign immunity were permitted to "trump[] every other aspect of the Constitution." *Bartlett* v. *Bowen*, 816 F.2d at 711.

Petitioner seeks to avoid the holding of *Larson* on the ground that the relief Doe seeks—reinstatement—will require affirmative action by the government. (Pet. Br. 29-30 & n.26). This argument is based on a footnote in *Larson* that states that "a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." 337 U.S. at 691 n.11. The *Larson* footnote, however, has been interpreted not to bar suits for redress of constitutional violations even where the sovereign is called upon to take affirmative action. *Smith* v. *Lehman*, 689 F.2d 342, 345, 345 n.7 (2d Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983); *Clark* v. *United States*, 691 F.2d 837, 840 (7th Cir. 1982); *De Lao* v. *Califano*, 560 F.2d 1384, 1391 (9th Cir. 1977). In *Smith*, for example, the Second Circuit stated flatly that "sovereign immunity does not apply in cases of alleged constitutional violations even where the sovereign is called upon to take affirmative action . . . ." 689 F.2d at 345 n.7.[24]

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed, or, in the alternative, the petition should be dismissed as improvidently granted.

Respectfully submitted,

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[24] Petitioner also mistakenly relies (Pet. Br. 41) on *Lynch* v. *United States*, 292 U.S. 571 (1934), to support its sovereign immunity argument. In that case, plaintiffs' claims were dismissed not because of sovereign immunity but because Congress had abrogated the government issued insurance policies on which plaintiffs sought to collect. *Id.* at 583. *See Bartlett* v. *Bowen*, 816 F.2d at 708.

REPLY

BRIEF

No. 86-1294

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. WEBSTER, DIRECTOR
OF CENTRAL INTELLIGENCE, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1294

WILLIAM H. WEBSTER, DIRECTOR
OF CENTRAL INTELLIGENCE, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The principal energy behind respondent's claim is his contention that the Director's interpretation of Section 102(c), 50 U.S.C. 403(c), is an offense to the ideal of the rule of law and threatens to oust the courts from their central role as guardians of legality and the rights of citizens. As we show in some detail, that contention is a hobgoblin. It is respondent who proposes what would amount to a heretofore unknown and mischievous intrusion into the tightly circumscribed domain of the secret intelligence agencies. We submit for this Court's judgment an exceedingly narrow proposition—one that was mandated by Congress—regarding a very limited and unusual type of agency, a proposition we offer only in respect to a very limited range of decision by the heads of those agencies, and then only as to a specified kind of person standing in a defined relation to those agencies:

The head of an intelligence agency must have the final and unreviewable authority to dismiss an employee from its service. And of course it is the province of this Court to determine whether this narrow proposition holds at all, and if it does what are its limits.

A. Respondent argues (Br. 16-17) that the writ of certiorari should be dismissed as improvidently granted because, he contends, the only issue presented is whether he can obtain judicial review of his constitutional claims, and that issue was conceded away by petitioner in the courts below. That assertion is wrong. It is obvious from a reading of the court of appeals' decision that statutory as well as constitutional claims remain in the case on remand to the district court.[1] Further, respondent misreads the record in claiming that petitioner has conceded the availability of judicial review for constitutional claims.

In the district court, we argued, inter alia, that separation of powers principles preclude a court from reviewing any of respondent's claims, and that because respondent's constitutional claims were insubstantial, the district court did not need to decide whether judicial review of colorable constitutional claims would be barred.[2]

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[1] The court of appeals directed the district court to determine whether a policy of dismissing all homosexuals merely because of their sexual orientation exceeded the Director's statutory authority under Section 102(c), 50 U.S.C. 403(c). "At the very least, the CIA would have to justify why such a ban on the employment of homosexuals was 'necessary or advisable in the interests of the United States'" (Pet. App. 27a). Respondent has not suggested that he has waived his claims that the Director's action was arbitrary and capricious or beyond his statutory authority.

[2] Mem. of Points and Authorities in Support of Motion to Dismiss 14-18 (filed Sept. 20, 1982); 2/25/83 Tr. 38, 51, 52. (The relevant portions of the transcript of the argument in district court are reprinted in an appendix to this brief. We have lodged 10 copies of the full transcript with the Clerk.) Thus, we sought to take the approach this Court followed in *Heckler* v. *Chaney*, 470 U.S. 821, 838 (1985), and *Heckler* v. *Ringer*, 466 U.S. 602, 608-609 n.4 (1984), where the Court found that the statutory scheme precluded review and that the plaintiffs' constitutional claims are insubstantial.

In the court of appeals, we argued that, under settled law, including the D.C. Circuit's decision in *Dronenburg* v. *Zech*, 741 F.2d 1388 (1984), respondent's constitutional claims were insubstantial and that the court of appeals need not decide whether Section 102(c) precludes review of a colorable constitutional claim.[3] At no time in either court did we take the position that a court could review respondent's particular constitutional claims. To the contrary, in both courts we asserted clearly and at some length the proposition that judicial review of respondent's substantive claims is barred by Section 102(c).[4]

When read in this context, the remarks cited by respondent certainly do not constitute a concession that respondent is entitled to judicial review of his constitutional claims. The statements in the district court that the Director does not have "power to act unconstitutionally" (2/25/83 Tr. 37) and that the government did not assert that Section 102(c) "insulates [the Director] from the Constitution" (2/25/83 Tr. 51) are plainly correct. They say only that the Director is obligated to

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[3] Appellant's C.A. Reply Br. 23-24, 35 n.19; 3/13/86 Tr. 11-15. (The relevant portions of the transcript of the argument in the court of appeals are reprinted in an appendix to this brief. We have lodged 10 copies of the full transcript with the Clerk.)

[4] In petitioner's motion to dismiss in the district court, we argued that, in light of Section 102(c), CIA termination decisions are exercises "of non-reviewable executive power" and involve nonjusticiable matters. Defendant's Motion to Dismiss at 14-18. In the court of appeals, the majority of our opening brief was devoted to a section entitled "The DCI's Decision To Terminate Employment Pursuant To Section 102(c) Is Not Judicially Reviewable" (Appellant's C.A. Br. 18-42).

comply with the Constitution in carrying out his responsibilities under the Act, and say nothing about the availability of judicial review. The other cited statement in the district court—that government counsel "suppose[d]" it "would be possible" for a claim to be raised "which would introduce constitutional issues that would have to be resolved by the Court" (2/25/83 Tr. 38), likewise is fully consistent with our current position. Unlike the present case, which we argued below raised no colorable constitutional claim, other constitutional claims might not be so easily resolved. The constitutional question of the reviewability of such claims—which we maintained was not presented in this case—would then have to be answered.

The only comment made below that remotely approaches a "concession" is the statement that a court may determine whether the Director in fact made the finding required by the statute that an employee's dismissal was "in the interest of the United States" (3/13/86 Tr. 16). That remark is a far cry from a concession that respondent can obtain review of his particular constitutional claims. Finally, if there were any doubt left about the matter, the court of appeals' decision shows that it considered and rejected the position that Section 102(c) forecloses review under the APA of constitutional claims.[5] Pet. App. 24a, 27a-28a; *id.* at 33a (Ginsburg, J., concurring). That question was presented in our petition and is properly before the Court in this case.[6]

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[5] The court of appeals' statement (Pet. App. 17a) quoted by respondent (Br. 16) that the government was not prepared to state that constitutional claims are precluded is incomplete; in the next sentence, counsel stated that "I do know that this Court can decide its case as the Supreme Court in Heckler v. Chaney, just put that situation where there is substantial constitutional claim aside, you don't have to reach it" (3/13/86 Tr. 13).

[6] In a footnote (Br. 18 n.7), respondent renews his argument that the district court could award him complete relief under 28 U.S.C. 1331, regardless of how his APA claim is resolved. That claim is fully addressed in our opening brief (at 29-32). See *Califano* v. *Sanders*, 430 U.S. 99, 105 (1977) (Section 1331 is "subject * * * to preclusion-of-review statutes created or retained by Congress").

B. Respondent's answer to our preclusion argument is essentially that Section 102(c) differs from the statutes relating to discharge of National Security Agency (NSA) and Defense Intelligence Agency (DIA) personnel in that Section 102(c) does not bar judicial review expressly. He argues further that this deficiency cannot be offset by the additional evidence of congressional intent which we have adduced.

1. The fact that the statutes governing the NSA and the DIA expressly provide that the action of the Secretary of Defense is "final" shows merely that Congress would draft Section 102(c) differently today. Section 102(c) was written in 1947 and must be read in "its contemporary legal context" (*Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982) (citation omitted)),[7] not that of today.[8] The Court's decisions during the relevant period did not require a statute to state expressly that judicial review was foreclosed for a statute to be given that effect. See *Ludecke* v. *Watkins*, 335 U.S. 160 (1948). It is a crucial part of the explanatory legal context of Section 102(c) that, as a matter of black letter law in 1947, federal employees

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[7] Cf. *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 280 (1980) (footnote omitted) ("In attempting to ascertain the legislative intent underlying a statute enacted over 50 years ago, the view that once 'dominate[d] the field' is more enlightening than a recent state-law trend that has not motivated subsequent Congresses to amend the federal statute.").

[8] Even today, there is no rule that the text of a statute must explicitly foreclose judicial review in order that it be fairly read to accomplish that result. *E.g.*, *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984); *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Morris* v. *Gressette*, 432 U.S. 491 (1977).

served at the will of the appointing officer and courts could not review personnel actions absent express statutory authorization. Pet. Br. 11-12 & n.8, 16; *e.g.*, *White* v. *Berry*, 171 U.S. 366 (1898). It is further clear that neither of the statutes which would otherwise possibly have applied to CIA employees—the Lloyd-LaFollette Act, 5 U.S.C. (1940 ed.) 652, and the Veterans' Preference Act of 1944, 5 U.S.C. (1946 ed.) 863—empowered the courts to undertake judicial review. Thus, Congress, in promulgating a statute conferring complete discretion on the Director, had no reason to be more explicit concerning judicial review.

The root inquiry is whether Congress intended the Director to have the final say in a removal dispute. In the national security area Congress has consistently left to the Executive the decision whether to discharge an employee. In recent years Congress has used the term that the action of the Secretary of Defense shall be "final." 10 U.S.C. (Supp. IV) 1604(e); 10 U.S.C. (Supp. IV) 1590(e). Section 102(c) makes the same point without using that term. In 1947 the only body with authority to reverse a decision to remove a federal employee was the Civil Service Commission, and it could do so only for a veteran. 5 U.S.C. (1946 ed.) 863. Section 102(c) lifted even that limited restraint from the Director's removal authority, and thereby made the Director's decision as "final" as it would have been if that term had been written into the statute itself.

Moreover, as we pointed out in our opening brief in this case (at 12-13 n.9) and argued in detail in our brief in *United States* v. *Fausto*, No. 86-595, the Civil Service Reform Act of 1978, 5 U.S.C. 7501 *et seq.*, provides the exclusive vehicle for a federal employee to obtain judicial review of his discharge. Section 102(c), however, expressly denies employees like respondent any rights under the federal civil service laws, as the D.C. Circuit recognized in a decision handed down after the one in this case. See *Neely* v. *United States*, No. 86-2266

(Nov. 24, 1986), cert. denied, No. 86-6716 (Oct. 5, 1987). It therefore was error for the court here to afford respondent greater rights under the APA than he would have under the CSRA.

Nor does respondent anywhere explain why the decision to remove a CIA employee is not one committed to the Director's discretion by Section 102(c). The language of Section 102(c) precisely tracks the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 701(a)(2), and could not be clearer in this regard. Nor does Section 102(c) contain any standard by which a court can rationally evaluate the Director's action. Respondent has offered no guideline for a court to use to determine whether an employee's removal is "in the interests of the United States" (see Br. 37). Deciding whether a particular employee should no longer have access to classified intelligence information is an inherently discretionary judgment that courts are not equipped to review, and that in any event could not be adjudicated in the course of a lawsuit without compromising sensitive interests. *See CIA* v. *Sims*, 471 U.S. 159, 176, 179 (1985).

The reinstatement remedy sought by respondent also militates against review of the Director's actions. Respondent's ultimate conclusion in this suit is that he should be returned to "a covert position as an electronics technician" with the CIA (Pet. App. 3a), despite the Director's objection that respondent's access to and participation in the CIA's sensitive day-to-day operations is not in the nation's interests. Like the 13th chime of the clock, this contention alone should give the Court pause about what has come before.[9]

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[9] That is not, however, the only implication of respondent's argument. It also raises substantial questions about the authority of the President to remove persons in whom the President lacks confidence in order to safeguard national security. See generally *Myers* v. *United States*, 272 U.S. 52 (1926); Pet. Br. 35-36. Indeed, if respondent's theory is correct, one wonders why the Director of

2. Respondent's interpretation of Section 102(c) makes nonsense of Congress's determination to safeguard the integrity of the decisions by the heads of the intelligence services to remove employees. Respondent concedes (Br. 27-28 & n.12) that the Secretary of Defense has the unreviewable authority to remove civilian intelligence personnel from the NSA, the DIA, and the military departments.[10] Respondent does not deny that Congress enacted the laws granting the Secretary of Defense that authority in order to provide him with the same authority that Congress thought the Director already possessed (Pet. Br. 24-25 & nn.20-21). And respondent does not question the CIA's central role in the intelligence community (Pet. Br. 26). Thus, respondent concedes that the head of every intelligence branch—except the one that Congress specifically chartered to oversee and coordinate all of the government's intelligence operations (*ibid.*)—has unreviewable authority to remove an employee like respondent. Indeed, Congress conferred that authority on the Secretary of Defense on the assumption that the Director of the CIA already possessed it.

3. Respondent also finds fault in our reliance on other statutes enacted contemporaneously with Section 102(c)

Central Intelligence, the Assistant to the President for National Security Affairs (National Security Advisor), and the Secretary of State or Defense might not also contest their removals and demand to be reinstated unless the President can establish to a court's "satisf[action]" (Pet. App. 17a) that the action is not arbitrary or capricious. It begs the question to say in distinction that these persons hold offices made subject by Congress to the constitutional process of appointment and confirmation. Congress has also created the office in question here—employee of the CIA—on the terms that it is held at the will and pleasure of the Director.

[10] Respondent is silent about the preclusive effect of 5 U.S.C. 7532, but the text and legislative history of that provision are as clear on this point as the text and legislative history of the NSA, DIA, and military department statutes that respondent finds persuasive (Pet. Br. 26 n.22, App. 1a-5a). Respondent therefore would seem compelled to agree that 5 U.S.C. 7532 also bars review.

and on the existing statutory scheme governing employment in the intelligence community. That evidence of congressional intent cannot simply be dismissed, as respondent would (Br. 24-35), on the ground that Congress knows how to preclude review expressly when it wants to do so, or that it is nothing more than subsequent legislative history that can be disregarded when interpreting an earlier statute. The essential point is that Congress has consistently determined (in words chosen from the legal lexicon of the time) that whether a person should be employed in an intelligence branch is a judgment that should be made not by the courts, but by officials in the Executive Branch who are accountable to the President and Congress for protecting the nation's security.[11]

Respondent contends (Br. 25-27) that the APA changed the entire landscape, by bringing about judicial

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[11] History bears out that conclusion. As Commander-in Chief, the President has always had plenary authority to reassign military personnel from an intelligence post to other duties, and the terms and conditions of intelligence operations have historically not been subject to judicial oversight. *Totten* v. *United States*, 92 U.S. 105 (1875). Between 1940 and 1953, Congress adopted more than a dozen Acts granting the head of certain executive departments the authority summarily to dismiss an employee. Pet. Br. 19-20 & n.15, App. 6a-9a. Respondent does not dispute that in creating the CIA, Congress, at a minimum, deprived CIA personnel of the limited administrative procedural rights granted other federal employees. 50 U.S.C. 403(c); *Neely* v. *United States*, No. 86-2266 (D.C. Cir. Nov. 24, 1986), cert. denied, No. 86-6716 (Oct. 5, 1987). In 1950, Congress entrusted the heads of federal agencies with unreviewable authority to discharge personnel in sensitive positions in order to safeguard the national security against compromise. 5 U.S.C. 7532; *Cole* v. *Young*, 351 U.S. 536 (1956). In 1964, Congress gave the Secretary of Defense a similar authority over all NSA employees. 50 U.S.C. 833(a). In 1978, Congress exempted the CIA from the new provisions added to the civil service laws by the Civil Service Reform Act of 1978, 5 U.S.C. 2302(a)(2)(C)(ii), 2305, 4301(1)(C)(ii). And in 1984 and 1986, Congress extended the Secretary of Defense's summary dismissal authority to reach all DIA employees. 10 U.S.C. (Supp. IV) 1604(e); 10 U.S.C. (Supp. IV) 1590(e)(1).

review of personnel actions. But the APA did not have the effect respondent attributes to it. In adopting that statute, Congress was careful to exclude disputes regarding the "selection or tenure of an employee" from the requirements governing formal agency adjudications, since Congress did not intend the APA to reduce the Executive Branch's discretion over personnel matters.[12] Congress therefore scarcely intended to reverse the long standing rule that federal personnel decisions are presumptively unreviewable by authorizing the courts to review agency action under the APA. And the APA surely does not purport to limit the President's authority to select which persons may receive access to classified information. Deciding whether a person should continue to be employed by the CIA necessarily entails a decision about whether such person should have access to classified information because the nature of the Agency's work requires that all Agency employees be approved for access to classified intelligence information. Whatever Congress may have thought "the full implications" of the APA would be (Resp. Br. 25), Congress did not intend to restrict the President's authority to safeguard intelligence operations by denying employees access to sensitive information.

4. Respondent argues (Br. 21-24) that the Court's decision in *Service* v. *Dulles*, 354 U.S. 363 (1957), rejected our contention that Section 102(c) precludes judicial review under the APA. In *Service*, a former employee of the State Department challenged his dismissal

[12] 5 U.S.C. 554(a)(2); H.R. Rep. 1980, 79th Cong., 2d Sess. 27-28 (1946); S. Rep. 752, 79th Cong., 1st Sess. 17 (1945); Senate Comm. on the Judiciary, *Administrative Procedure Act: Legislative History*, S. Doc. 248, 79th Cong., 2d Sess. 202, 260-261 (1946); *Attorney General's Manual on the Administrative Procedure Act* 44 (1947 & reprint 1979); 86-1442 Mem. in Opp. 8. The Senate Report on the APA explained that the exemption was included since "the selection and control of public personnel has been traditionally regarded as a discretionary function which, if to be overturned, should be done by separate legislation." S. Rep. 752, *supra*, at 17. Accord H.R. Rep. 1980, *supra*, at 27-28.

under the McCarran Rider,[13] which granted the Secretary of State plenary authority to dismiss State Department employees. Although the court of appeals held that it could not review the Secretary's action, this Court reversed, on the ground that it could determine whether the Secretary had complied with State Department regulations governing dismissals. 354 U.S. at 373-389. Respondent argues that, since the Court found the Secretary's action reviewable in *Service* for compliance with the agency's own regulations despite a similar preclusion statute, the Director's action in this case is also reviewable despite Section 102(c). Respondent misreads the decision in *Service*.

First, in view of circumstances peculiar to the enactment of the McCarran Rider, it does not follow from *Service* that Section 102(c) allows judicial review even of the very limited question of compliance with CIA regulations. As this Court noted in *Service* (354 U.S. at 377-379), the State Department had informed Congress that it would exercise its authority under the McCarran Rider in accordance with existing Departmental regulations, this representation was relied on by Congress in enacting successive versions of the Rider, that course was endorsed in writing by the President.[14] No such representations accompanied the enactment of Section 102(c).

[13] The version of the McCarran Rider at issue in *Service* was the Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1952, ch. 533, Tit. I, § 102, 65 Stat. 581.

[14] As this Court explained (354 U.S. at 380 (footnote omitted)), "[a]lthough Congress was advised in unmistakable terms that the Secretary had seen fit to limit by regulations the discretion conferred upon him, * * * it continued to re-enact the McCarran Rider without change for several succeeding years. Cf. *Labor Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116." In sum, the Court concluded that, by continuing to pass the McCarran Rider in that setting, Congress had endorsed the Secretary's policy of restricting his plenary removal authority. That reading of the foregoing passage is supported by the two

Second, even if Section 102(c) were read to allow review of the Director's action for compliance with CIA regulations, that conclusion neither suggests that any broader review is appropriate, nor supports respondent's argument here. This Court in *Service* did not question the conclusion of the court of appeals that judicial review was limited to compliance with procedural requirements —it simply disagreed with the lower court in determining what those requirements were. Also, as we have explained (Pet. 26), the court of appeals here ruled that the Director in fact complied with whatever CIA regulations might be relevant in removing respondent (Pet. App. 19a-23a). *Service* therefore does not aid respondent.

Respondent also claims (Br. 30) that *Cole* v. *Young*, 351 U.S. 536 (1956), supports his position, because the Court in that case determined whether a related preclusion statute, the Act of August 26, 1950, 5 U.S.C. 7532, was applicable to a particular employee. The question whether a preclusion statute is applicable to a particular employee, however, is distinct from the question whether a court may review an action taken under a preclusion statute which is conceded to apply. *Cole* held only that a court may review the former question. See *Doe* v. *Weinberger*, 820 F.2d 1275, 1279, 1283 (D.C. Cir. 1987), petition for cert. pending, No. 87-751. Indeed, *Cole* implied that the head of an agency who properly acts under 5 U.S.C. 7532 would have "the final say" whether an employee should be removed. 351 U.S. at 546. Thus, *Cole* supports our position, not respondent's.

5. Respondent argues (Br. 37-38) that he should be entitled to obtain review under the APA because the Director's actions can be reviewed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. In our

cases cited by the Court, *Gullett Gin* and *Mohawk Co.*, both of which stated that Congress will be deemed to have endorsed a longstanding agency practice if the practice is brought to Congress' attention and Congress either legislates on the basis of that practice, or does not reject it.

view, Title VII is not applicable to discharge actions taken under Section 102(c). While it is correct that a CIA employee has recourse to Title VII in connection with other aspects of his employment relationship, it has never been held that he may invoke Title VII to challenge the Director's discharge decision, which is the only type of decision covered by Section 102(c). Nor has it been established that Title VII expressly or impliedly repeals Section 102(c).[15] Even if respondent were correct about the applicability of Title VII to discharge cases (and this case does not require the Court to resolve the point), that would not change the analysis of this case, which does not involve Title VII.[16]

[15] Congress would not be "astound[ed]" by a conclusion denying relief in discharge cases (Br. 37), because Congress has enacted other statutes since Title VII foreclosing review of the removal of NSA and DIA employees. Respondent apparently agrees with us that NSA and DIA employees cannot invoke Title VII, because he concedes (Br. 27-28) that the statutes authorizing the summary dismissal of NSA and DIA employees bar all judicial review. As we have explained (Pet. Reply Mem. 7 n.8) only one case cited by respondent, the *Neely* case, involved the dismissal of an employee, and it was a hybrid. The plaintiff alleged that the CIA had discriminatorily denied her a promotion and had dismissed her in retaliation for pursuing her discrimination claim. Since the plaintiff's first claim was not precluded by Section 102(c), the Director did not argue that the action was nonreviewable. To our knowledge, *Neely* is the only Title VII suit against the CIA involving the removal of an employee.

[16] Even if CIA employees could bring Title VII discharge claims, this would not mean that our contention about the Director's unreviewable Section 102(c) authority in other cases is anomalous. Congress could have concluded that discrimination based on race, gender, and national origin is so abhorrent to our national traditions that extraordinary measures (and risks) are justified in rooting it out wherever it exists. That judgment does not mean that Congress also intended to subject CIA discharge decisions—even those not involving a Title VII claim—to all the hazards of litigation whenever a plaintiff states what some court finds to be a colorable constitutional or statutory claim.

Respondent also suggests (Br. 38-39) that allowing redress under Title VII for any range of personnel decisions is inconsistent with our contention regarding the Director's ultimate authority under Section 102(c). To the contrary, the dispute-resolution framework established under Title VII, and the Agency's own established procedures for resolving employee disputes, which essentially follow EEOC regulations (CIA Headquarters Reg. 9-1 EEO Program (May 30, 1978)) work quite well in a national security context where the Director is understood to have ultimate and unreviewable removal authority.

We are informed by the Agency that the Director's authority under Section 102(c) is rarely invoked, and to our knowledge only ~~six~~ Title VII law suits have been filed since the Agency was made subject to that provision. On reflection, this is what one would expect. It is obviously in the Agency's interest to rely as far as possible on informal accommodations, since in a hostile and adversary encounter the Agency does not hold all the cards. Agency employees are privy to the most delicate secret information, so a disgruntled employee who has been involuntarily dismissed may be in a position to do considerable damage. That is why when difficulties surface the Agency may take quite a time, as it did here, to reach a conclusion, and will seek informal compromises including an opportunity for voluntary resignation (again, as in this case). Only if all else fails will the Director's Section 102(c) authority be invoked, and because that authority has long been accepted without question, its invocation seldom becomes necessary. If that authority could be challenged in public litigation, as respondent seeks to do, the delicate balance would be destroyed, and it is far from clear that what would replace it would better serve the interests of anyone concerned.

C. Relying on Article III, separation of powers principles, and the Due Process Clause, respondent maintains (Br. 41-49) that Congress may not deprive the

courts of the opportunity to consider a constitutional challenge to the Director's decision to dismiss a CIA employee. We submit, to the contrary, that the statutory denial of judicial review is sufficiently clear, and the governmental interests underlying it are of such importance, that the denial of a cause of action for reinstatement is plainly constitutional. The suggestion that this narrow conclusion might somehow expand of its own force to deny judicial review of other, more oppressive executive actions, is aptly answered by Justice Holmes' phrase, "Not while this Court sits." *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (dissenting opinion). For whether a particular preclusion of review is constitutional is itself a constitutional question, review of which may not be precluded.[17]

1. It is simply not correct, as respondent implies, that the courts must be able to adjudicate every constitutional challenge to the actions of Executive Branch officers. A variety of allied principles—including the law of standing, ripeness, and mootness, the political question doctrine, and the law of absolute and qualified immunity—can prevent a party from obtaining judicial review on the merits of an allegedly unconstitutional action by the Executive.[18] Various actions taken by the President and

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[17] The conclusion we urge would also be reached by a determination that there simply is no constitutional right to continued employment by the CIA. In much the same way, the question whether courts may inquire into the President's decision to name or remove a member of his cabinet may be put either as one regarding constitutional rights or as a question of justiciability. Professor Hart appears to acknowledge this connection between the substance of the claim and the permissibility of preclusion. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1386-1387 (1953). Compare *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). See also Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L. J. 597, 601 (1976).

[18] See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737 (1984); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454

Congress—such as the President's nomination of and Congress's consent to an individual named to head an Executive Branch department or agency (such as the CIA); decisions made in the course of foreign policy, such as whether to extend diplomatic recognition to or to endorse a treaty with a foreign nation, or whether to declare war; and the conduct of operations in a theatre of war—are not subject to judicial review, even though they can affect the interests of a private party far more seriously than the Director's decision to dismiss an employee from the CIA. The principle that the Constitution entrusts some decisions to the political branches is therefore no less central to our system of government than the principle of judicial review.[19]

Included in the unreviewable authority entrusted to the President is the power to appoint, with the advice and consent of the Senate, "the principal Officer in each

U.S. 464 (1982); *Goldwater* v. *Carter*, 444 U.S. 996 (1979); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Laird* v. *Tatum*, 408 U.S. 1 (1972); *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950).

[19] Respondent relies heavily (Br. 17, 42, 45) on *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), as support for his claimed right of judicial review in this case. *Marbury*, however, recognized (5 U.S. (1 Cranch), at 165-166, 170) that many important decisions are not reviewable:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. * * * * [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. * * * Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

of the executive Departments" to assist him in carrying out his responsibilities. U.S. Const. Art. II, § 2, Cl. 1. As a corollary to that power, the President has the inherent authority to remove such officers when he deems it necessary or advisable to do so. *Myers* v. *United States*, 272 U.S. 52, 117-161 (1926).[20] The President is also responsible for controlling access by government employees to information bearing on the national security by virtue of his "executive Power," his authority as "Commander in Chief of the Army and Navy," and his obligation to " 'preserve, protect, and defend the Constitution of the United States.' " U.S. Const. Art. II, § 1, Cls. 1, 8, § 2, Cl. 1. *E.g.*, *Haig* v. *Agee*, 453 U.S. 280, 293-294, 304 (1981); *New York Times Co.* v. *United States*, 403 U.S. 713, 729-730 (1971) (Stewart, J., concurring); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 890 (1961).

In enacting Section 102(c), Congress sought to facilitate the President's authority in both of these areas by, in effect, giving all CIA personnel the same tenure held by the Director himself. The Director serves at the pleasure of the President, while the CIA's other officers and employees serve at the pleasure of the Director. This Congressional decision to designate CIA personnel as "at will" employees is well justified by the circum-

[20] The issue of the President's authority to remove the principal officers of government was considered by the First Congress during a debate on legislation to establish departments in the Executive Branch. The question arose whether the President had the inherent authority to remove the head of the Department of Foreign Affairs, the predecessor to the Department of State, without the advice and consent of the Senate, or whether that authority had to be affirmatively vested in the President by Congress. In what has come to be known as the "Decision of 1789," Congress concluded that the removal power resides in the President alone. *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 7-8; *Myers*, 272 U.S. at 111-132. That Decision, as this Court has recognized, provides " 'contemporaneous and weighty evidence' of the Constitution's meaning." *Bowsher*, slip op. 8 (citation omitted).

stances of their employment. The nature of the CIA's work is such that every employee has access to sensitive information that cannot be revealed to the public. The Director's decision that an employee must be removed is therefore, in large measure, a decision that he must no longer be in a position giving him access to information concerning or derived from the CIA's operations. No one, much less a CIA employee, can claim that the Constitution guarantees him a right to challenge in court the denial of access to information whose disclosure the President believes would be detrimental to the national security—particularly where the Congress has expressly sought to give unreviewable authority to the Executive to control such access. See *Snepp* v. *United States*, 444 U.S. 507 (1980).

The military or state secrets privilege (*United States* v. *Reynolds*, 345 U.S. 1 (1953)) supports this conclusion. See also 5 U.S.C. 552(b)(1)(A) (FOIA exemption for classified information). As we explained in our opening brief (at 38-39), this privilege protects against the disclosure of information damaging to the national security, even when constitutional claims are involved. By making the Director's action nonreviewable, Section 102(c) protects the same interests as the privilege; the difference is that Section 102(c) gives the Director the ultimate authority to make the decision. The determination whether permitting a particular individual access to secret information runs an impermissible risk of harming national security interests is necessarily speculative, involving precisely the type of "prophecy" (*Chicago & Southern Air Lines, Inc.* v. *Waterman Corp.*, 333 U.S. 103, 111 (1948)) that courts are ill-suited to undertake. It is an attempt to predict that individual's future behavior, to assess whether he might, through disloyalty or venality or carelessness or under the compulsion of circumstances beyond his control, compromise sensitive information. The prediction may be based upon the individual's

past or present conduct; but it may also be based upon concerns unrelated to an individual's conduct, such as whether he or his associates have close relatives residing in a country that is hostile to the United States. Doubts are necessarily resolved against the individual seeking access to our nation's secrets; it is better that nine persons who might never compromise classified information be denied access to it, than that access be granted to one person who does. The Director, unlike a court, is familiar with "'the whole picture'" (*CIA* v. *Sims*, 471 U.S. at 179), relating to our national security interests, and it is entirely proper that such an assessment should be left to him.[21]

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

DAVID P. DOHERTY
General Counsel
Central Intelligence Agency

DECEMBER 1987

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[21] It is no answer to our argument that the Director can prevent the disclosure of confidential information in the context of a suit for reinstatement such as this one by invoking the state secrets privilege or by relying on 50 U.S.C. 403(d)(3) and 403g to withhold particular information. In some cases, invoking a privilege can reveal information that should not be disclosed. *CIA* v. *Sims*, 471 U.S. at 179 ("It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency.").

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2016

JOHN DOE, PLAINTIFF

v.

WILLIAM CASEY, DEFENDANT

Washington, D.C.
Friday, February 25, 1983

The above-entitled action came for hearing on cross-motions for summary judgment before the Honorable BARRINGTON D. PARKER, United States District Court Judge, in Courtroom No. 19, commencing approximately 11:00 o'clock, a.m.

APPEARANCES:

For the Plaintiff:

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Washington, D.C. 20505

[3] *PROCEEDINGS*

THE DEPUTY MARSHAL: Remain seated and come to order.

This Honorable Court is again in session.

THE DEPUTY CLERK: John Doe v. William Casey, Civil Action 82-2016.

Mr. Lynch and Miss Shaffer represent the plaintiff. Mr. White, Mr. Burke and Mr. Jaksetic represent the defendant.

THE COURT: Cross-motions of summary judgment?

MR. WHITE: That is correct, Your Honor.

MR. LYNCH: Yes, Your Honor.

THE COURT: Who filed earlier?

MR. LYNCH: We filed the first motion for summary judgment. The Government has a motion to dismiss as well, but we filed the first, yes.

THE COURT: Counsel, come to the lectern.

MR. WHITE: Yes, Your Honor.

THE COURT: What is the theory of the motion to dismiss?

MR. WHITE: Your Honor, my name is David White.

THE COURT: I am sorry?

MR. WHITE: Department of Justice

We have basically four theories, Your Honor.

* * * *

[4] We further argue that plaintiff has failed to state a claim upon which relief may be granted inasmuch as this suit is barred by the Doctrine of Sovereign Immunity and that the issues are nonjusticiable.

* * * * *

[37] AFTER RECESS

(12:02 p.m.)

THE DEPUTY MARSHAL: Remain seated and come to order.

THE COURT: You may proceed, counsel.

MR. WHITE: Thank you, Your Honor.

THE COURT: I may indicate that one troublesome question, I don't know whether it is troublesome or not, but one paramount question emerges from all I have heard this morning and also from the papers filed in this proceeding is whether or not you claim that the agency has unlimited and unbridled authority.

Mr. Lynch used the rather extravagant example that if you follow your argument to its conclusion, you could make a determination that all one-armed men with a cleft palate would be dismissed.

THE COURT: I want to know to what extent you claim the authority to do the sort of thing that he claims is done here without any statement of reasons.

MR. WHITE: The director is not asserting that he has what the Court has characterized as unlimited or unbridled authority.

The statutes applicable to the Director's authority certainly do not give him the power to act unconstitutionally and the provisions of Title VII, for example, would apply [38] if there is a fair allegation of improper personnel practices discriminating against employees on the basis of race, for example.

The position of the Director is based upon the statute, is that his authority is very broad because the statute says that notwithstanding the provisions of any other law, the Director of Central Intelligence may in his discretion terminate an employee when he deems it advisable or necessary in the interests of the United States. And the cases that have reviewed this matter specifically, Baker and Pittman and the other cases that the Court referred to and that Mr. Lynch referred to have all held that the Director's authority is very broad. In one case it was described as plenary.

* * * * *

[50] THE COURT: Would you like to comment on this statement: "Defendant suggests that the interest of the [51] United States requires maximum secrecy about the

CIA and that such secrecy could best be preserved by foreclosure of judicial review of agency personnel decisions, but neither the language nor the apparent intent of Section 403(3) suggests that Congress intended to protect the secrecy of the CIA at all costs or intended that the Director be the sole judge of the interests of the United States in all CIA personnel cases, even where the Constitution is implicated."

MR. WHITE: Your Honor, we make no assertion and the Director makes no assertion that the statute under which he acted in this case insulates him from the Constitution.

THE COURT: Well, you say that the plaintiff's constitutional argument is misplaced.

It doesn't rise to the level of a constitutional issue, is that it?

MR. WHITE: That is correct, Your Honor.

THE COURT: Did you know what I was reading from?

MR. WHITE: It sounded like the Jordan case, Your Honor, but I was not certain.

THE COURT: What do you think of Judge Oberdorfer's opinion?

You put it on the record, that is all right.

I won't share the transcript with him.

MR. WHITE: I think—

THE COURT: He will understand.

[52] MR. WHITE: I think basically there are two distinctions to be made. First is that in that case, as I understand it, the Agency was not arguing that there was no review if there was a substantial constitutional claim made; they were arguing that the plaintiff's act, which in that case was the publication of a telegram that he had sent back to headquarters, they were arguing that that act was not protected First Amendment activity.

And the second distinction to be made is obviously that in this case we don't have a First Amendment claim and as I stated, we don't have in this case subject matter which arises to a substantial constitutional claim.

Now I can see that there are possible problems attendant to that because the Court might ask, well, how do we know whether there is a substantial constitutional claim or not without looking into how the Director made his decision and, although that is a difficult question to answer, there are some circumstances which are analogous to that.

For example, in suits against federal officers the Courts, the Supreme Court recently held that in suits for personal damages against federal officers where there is a claim of constitutional violation, the Courts have held that basically there has to be a pretty substantial claim made before the defendant would be required to answer, and in the case of Harlow against Fitzgerald, decided last term by the [53] Supreme Court made reference to the fact that unless the law was clearly established at the time the defendant acted, then there will be no discovery and the claim will be dismissed.

Basically, that is a little bit of a paraphrase, but the point is, Your Honor, really the presumptions of regularity and proper action must go in favor of the Agency because of the Agency's special concerns and because of the interests reflected in the statute and, therefore, the plaintiff at a minimum must come forward with a substantial First Amendment claim or constitutional claim before the Court could begin to look at reviewing the circumstances.

Now in the absence of a concrete situation, I am not sure I could really address the issue any further. I would not know, for example, what position we would take if there had been a substantial First Amendment claim, and I suspect we would have several defenses—or I'm sorry I said First Amendment—but I meant constitutional in general.

THE COURT: The fact of the matter is we do not believe that there is substantial constitutional claim. He is labeled as a security risk; is that what he is labeled as?

MR. WHITE: Well, Your Honor, I would dispute that only in terms of how the label is applied. That is, I think we might have had a slightly different situation if a public disclosure were made so labeling him.

The circumstances here are that such a disclosure [54] would be made under special circumstances which have not arisen, and so no constitutional interest has at this point been affected, and in this case it would be the constitutional interest in liberty, as described by the plaintiff's papers.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5291

JOHN DOE, APPELLEE

v.

WILLIAM J. CASEY, DIRECTOR,
CENTRAL INTELLIGENCE AGENCY, APPELLANT

Thursday, March 13, 1986
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 9:30 a.m.

BEFORE:

CIRCUIT JUDGES EDWARDS, GINSBURG, and BUCKLEY.

APPEARANCES:

BARBARA C. BIDDLE, ESQ., Appellate Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20530; on behalf of Appellant.

MARK H. LYNCH, ESQ., American Civil Liberties Union Foundation, 122 Maryland Avenue, N.E., Washington, D.C. 20002; on behalf of Appellee.

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[3] *PROCEEDINGS*

THE CLERK: No. 85-5291, John Doe v. William J. Casey, Director, Central Intelligence Agency, Appellant.

Barbara C. Biddle, Esq., for appellant; and Mark H. Lynch, Esq., for appellee.

THE COURT: Ms. Biddle?

ORAL ARGUMENT OF BARBARA C. BIDDLE, ESQ., ON BEHALF OF APPELLANT

MS. BIDDLE: May it please the Court: My name is Barbara Biddle, from the Department of Justice, and I am representing the Director of the Central Intelligence Agency, William J. Casey.

* * * * *

[5] MS. BIDDLE: That's true, but some background on that is needed. 102(c) is the only statute that in any way defines the Director's termination authority. In a sense, all [6] personnel actions taken are pursuant to 102(c). It is the language of that that enables the Director to set up a personnel system the way he wishes to have it run. So 102(c) is mentioned even when procedures are being given to someone. That doesn't mean that it is one of the terminations the Director deems be necessary in the interests of the United States without any procedures.

Stepping back at the one would legally analyze the statute, it did not require the Director to give any procedures, does not keep the Director from deciding that he will set up procedures that he might give to some people if he does not believe that the more broad terminations without procedures is necessary. In essence, even setting up these procedures, while carefully preserving the summary procedure right, was an attempt to say when the Director feels he can give procedures he will do it.

QUESTION: So, you view it that the procedures themselves are entirely within the Director's discretion, that he can use these if he feels it is appropriate, if he doesn't think it is appropriate, he doesn't use them, that is how you read it?

MS. BIDDLE: That's correct, Your Honor.

QUESTION: And that is in his unreviewable discretion?

MS. BIDDLE: Right, and we submit that this is the [7] only way, in mentioning three times in the regulations, that Director may still terminate pursuant to 102(c) without procedures. The only way that an agency to have such broad authority can try to give some procedures to some people, without having them read as suddenly sweeping the statute aside, it was an attempt to give him this power to have procedures when he thought there would be no problem with giving them, without restricting in any way his 102(c) power.

As I say, the more sweeping basis for the District Court's decision, which would have far-ranging applicability, is the APA decision. The District Court we think applied the APA in violation of its own terms, but also without even considering that CIA employment implications unusual and special concerns that have been consistently recognized by Congress and by the courts in cases like Sims and Smith. But under an APA analysis, the APA would not apply even to review for arbitrary and capriciousness or abuse of discretion if there is another statute that precludes review, and that is 701(a)-(1), and we contend that section 102(c) is subject to the statute, but also that it does not apply when the decision is committed to agency discretion by law, that it is so discretionary that there is virtually no law to apply, and so that is equally applicable here.

The plain language of the statute, which is always the starting place, I think upholds both of those. The [8] phrases are that it is in the Director's discretion when

he deems it necessary or merely even advisable in the interest of the United States.

QUESTION: When is the substantive standard to apply?

MS. BIDDLE: The substantive standards?

QUESTION: There is a substantive standard to apply.

MS. BIDDLE: You are saying that there is a substantive standard to apply? You are saying that that language—

QUESTION: Otherwise, why not just say, why wouldn't the language just say within the total discretion of the Director to hire and fire, period?

MS. BIDDLE: That could have been, but the way Congress treated this language throughout other statutes and the way the courts have interpreted this language, there has never been any indication that that gives a substantive standard.

QUESTION: I don't find any cases that have clearly said that this statute precludes judicial review.

MS. BIDDLE: Any cases?

QUESTION: Yes.

MS. BIDDLE: I think there are not only the cases that have construed 102(c) that we cited, but this Court took the—

QUESTION: They are broad deference cases, as I read [9] them. I don't read any case like a Block case, in which a court has said the statute, either expressly or appliedly, says all judicial review is foreclosed. It is a very different standard as to whether it is talking about high deference, which is obviously towards preclusion.

MS. BIDDLE: In each of those cases, the Court did not undertake to do a review. And in addition to those four cases which—

QUESTION: Because they were deferring to the exercise of discretion. That is a very different argument.

In 701(b), this is certainly not a prosecutorial discretion case, as in Heckler—

MS. BIDDLE: No.

QUESTION: —and so you can't make that argument comfortably on the one 701 argument, and on the other 701 argument the standards are very, very high. You are put to an extraordinary test, there is a presumption of reviewability and even in Block that is what the Supreme Court said, there is a clear presumption of reviewability. There is case law under this.

MS. BIDDLE: There definitely is, and there is a presumption of reviewability and we feel this falls within that exception.

QUESTION: Well, this statute has been around since the forties, right?

[10] MS. BIDDLE: Yes, and that is—

QUESTION: And any case that says like Block, something like Block, it is clear in this language that judicial review is precluded, as distinguished from the Director has broad discretion to which we must defer greatly. They have very different standing.

MS. BIDDLE: I think there are cases that do that.

QUESTION: Well, you tell me which ones because I will go back and look at them again.

MS. BIDDLE: All right. One case which we cited in our brief, the Falkowski case, just recently had a denial of rehearing in which an opinion was written, but the basic decision had made this clear as well. There there was an interpretation of the Attorney General's authority to send an attorney into court to attend to the interests of the United States, and this Court found that that gave absolutely no standards which could be followed.

In following Heckler v. Chaney, saying although there is a presumption of review, this is one that says there are no standards, it is just too broad to decide what is in the interests of the United States.

QUESTION: Well, that doesn't follow Heckler. Maybe we made a mistake on that.

MS. BIDDLE: I'm not saying following the presumption part, but following the basic analysis of Heckler. In [11] addition, this same language that is in 102(c) was interpreted by this Court back in the fifties when—

QUESTION: The Supreme Court reversed on other grounds. You don't have any idea what they have to say about that, right?

MS. BIDDLE: I think that they did not in any way disturb this holding by the court. The Court said there is one question and that is whether the Director—in that case the Secretary—purported to invoke the interests of the United States, he did that and the inquiry ends. That is the same thing.

QUESTION: And that case got reversed by the Supreme Court.

MS. BIDDLE: On other grounds, but it did not in any way affect that.

QUESTION: Did the Supreme Court uphold that other holding?

MS. BIDDLE: It did not address it. I think you could say it implicitly upheld it.

QUESTION: Suppose the Director said in this case I'm dismissing this employee because he is black. Terrific, the best agent I have ever heard about and liked. It is all written out: He is terrific, no security risk, smart, probably should be the Director, but for the fact that I am not going to give up the job. There is nothing wrong with [12] this person, but I really don't like black people.

MS. BIDDLE: I think that case just isn't presented here.

QUESTION: Obviously the case isn't presented here, but your argument is, because your argument would include that case.

MS. BIDDLE: No, because our argument does not require the Court to address that case. Our argument—

QUESTION: It certainly does. A court has to understand where an argument is going to take it in future cases, and I am trying to understand if the judicial preclusion argument takes us and covers that kind of a case. You can't come up here and argue and say don't think about anything else.

MS. BIDDLE: I am not saying don't think about it.

QUESTION: Tell me how you analyze that case.

MS. BIDDLE: The Court time and again has entered opinions that say—

QUESTION: Counsel, indulge me, tell me where your argument takes you in my hypothetical.

MS. BIDDLE: First of all, it is a different hypothetical because you are talking about the Director giving reasons, which is something we are saying is not necessary under the statute.

QUESTION: Are you suggesting that it might be [13] reviewable if the Director gives the reason, but it is not reviewable if he gives no reason?

MS. BIDDLE: No, I was just saying it was difficult for me to comprehend how the situation would play out.

QUESTION: Let's take it first where he gives a reason. I was thinking of a hypothetical along the lines of Judge Edwards, and I was going to ask suppose the Director is told that the employee has announced that she is a mother and he then dismisses her, although her record has been sterling. Would you then say in that instance, too, he has given the reason on the record, unrelated to performance, unrelated to security, that that would be, that judicial review would be precluded?

MS. BIDDLE: I know it is frustrating, but I am not prepared to address that, because you are raising issues that would possibly raise other constitutionally protected interests which we don't have present in this case, and I don't know whether the CIA would take that position or whether the Solicitor General would approve of that kind of a position.

I do know that this Court can decide its case as the Supreme Court in Heckler v. Chaney, just put that situation where there is substantial constitutional claim aside, you don't have to reach it.

QUESTION: But you say that might raise a constitutional claim but we don't have that here, but there were [14] constitutional claims, Judge Parker said that they were alleged, they were difficult, and he found it unnecessary to reach them. So I think you can't distinguish this case on the ground that here there are no constitutional claims. There were constitutional claims argued but the judge didn't reach them.

MS. BIDDLE: We would submit that they are a different kind of constitutional claim, and the two constitutional sections being talked about here are the property and liberty interests, are one that the Court must find an entitlement and then procedures would flow. The kind of secondary constitutional review the Court would get into would be to see whether the procedures are followed, determination procedures, as to liberty in this context, whether a correct name clearing hearing had been given, which is quite a bit different than a substantive review of the reasons given by the DCI to decide as you would under the APA if it were applicable, whether it was the correct decision.

Because these two constitutional protections are ones where the mere finding of an entitlement raises the problem that the CIA has, our problem error we would have would be if this Court—the error we would complain of would be if this Court actually finds those protections, the entitlements, and we have said this Court can review and see if those entitlements are present. But for those two [15] constitutional issues at issue in this case, the question of secondary review of what the procedures are is almost beside the point now.

QUESTION: Well, let's get it out of the non-constitutional substantive question. Let's say the Director says and states the reason: He is a great employee,

super, no problems, one of the best I have ever heard about, I am just firing him. Why? I don't know, it just occured to me last night to fire him, for no particular reason at all. It is done.

MS. BIDDLE: If those reasons are unarticulated, perhaps the procedural regulations would be being followed. But what we are contending is that the nature of the intelligence apparatus, and I think—

QUESTION: Wait. Wait. Is there substantive review of that?

MS. BIDDLE: No, there is not.

QUESTION: There is not. Why?

MS. BIDDLE: And the reason is that Congress—

QUESTION: Even though the Director clearly is not doing what the statute says which he is authorized to do, that is to dismiss in the interests of the United States, the Director just positive disclaims any such interest. He is asked and he says I haven't the faintest idea, in fact it is probably not at all.

[16] MS. BIDDLE: If the Director does not even purport to say this is a firing in the interest of the United States, this Court could look to see whether he was following the statute, that he perhaps acted outside the statute.

QUESTION: I guess that is what the case is about, and there is no preclusion, is there?

MS. BIDDLE: Well, there is preclusion what we—

QUESTION: Well, you are looking to see whether or not you are following the stuff in the standard, then there is no preclusion.

MS. BIDDLE: It is not second-guessing the substantive standard, it is to see whether it—

QUESTION: That is deference—

MS. BIDDLE: Then you are misunderstanding what I am saying.

QUESTION: —to see whether or not he followed the constitutional standard of review. If you can't do that, that is preclusion.

MS. BIDDLE: What I was—

QUESTION: —like the prosecutorial, the Heckler cases, we can't second-guess, we can't even look in those cases because of the presumption of non-reviewability and, right or wrong, we can't look. But here you are now saying, well, if he doesn't really follow the mandate of course you can review.

[17] MS. BIDDLE: I think even in the prosecutorial area, there is usually something that that agency had that has to say, and if the Court finds that that has not even been said, the Court could require him to redo it and say it or look at why he didn't say it. That is all that I am saying, and it would apply even in that. It is bicking [*sic*] on what the word "preclusion" means. I am not saying that if the Director didn't invoke the words, this Court could then get into a complete substantive thing. You could just reverse the termination because it was not based on the interests of the United States.

If the Director says I am doing this in the interests of the United States, invoking statutory authority, then we are saying the court canont do it, it cannot substantively review that, even if the plaintiff is saying I know that he didn't do that because of any security concern or any other concern, I was a wonderful employee, he doesn't even know why he did it. If that is something the plaintiff is alleging there is no review. If there is a presumption that the Director is acting in a regular manner and that is what Congress is presuming, and the problem, if the Congress thinks the CIA Director is abusing the privilege, the solution for that is in the oversight committee, pust as everything else throughout the CIA is taken care of by oversight committees.

It is a recognition by Congress that intelligence [18] agencies, and the CIA in particular, are unique agencies. Something I would like to point the Court to that is cited in our reply brief and not quoted extensively, we might have the legislative history of the 1984 Act giving the Defense Intelligence Agency authority similar but more

restrictive than the CIA has. What that statute does is allows a determination to be made in the interests of the United States if the secretary of the agency determines that because of national security reasons other procedures couldn't be given. That is more restrictive than the CIA has, and yet that was made explicitly final, and what this legislative history says is that that was being done precisely to give them some of the flexibility that the CIA has. It is very informative on saying that the concerns we articulated in our opening brief about the nature of the agency and why Congress would have given the CIA this kind of authority, is reiterated in this Senate report as saying that is the reason why they wanted to give it to the Defense Intelligence Agency. And it is also important in that it explains why being in the excepted civil service was not good enough, that that was still more restrictive than what the CIA had because it did allow—and they use the words "external review forms" for excepted employees who are preference eligibles, and that is what Congress didn't think the CIA had, they thought it was unreviewable, and it is not what they wanted the Defense Intelligence Agency [19] to have.

* * * * *

[39] ORAL ARGUMENT OF
BARBARA C. BIDDLE, ESQ.,

MS. BIDDLE: Speaking to the regulation again, I think it is important to note that the plaintiff has conceded that the regulation allows summary determination, and we stand by our interpretation of that regulation.

The idea that there has to be an explanation of why the Director is going the summary route just turns the statutory scheme in which the regulations are based on its head, because the whole idea is that there has been statutory authority not to give reasons and the Director has tried to preserve that in the regulations, and to call

that the instance in which he would have to give the very reasons that he is saying you can't give and that is why he is going that route just is totally unworkable.

I don't think there is a general administrative law principle that every time there is an exception the court can then require reasons for it. I think Matlovich certainly doesn't stand for that.

We did also point out in our brief that there is a new regulation under some Supreme Court cases and this Court. We think this regulation is clear enough that you can say that there was no entitlement to any sort of reason, but if there is any doubt about that we would ask for a remand to have the new regulation looked at.

[40] Under the APA and the legislative history, I really think that the '83 history which was read by Judge Buckley was a comment about giving the DCI very similar authority, the DCIA Director very similar authority, and Congress was trying to make clear that their meaning by that was that would not be reviewable, just as 102(c) is and has been recognized by the Court. But I think the '84 legislative history for the Defense Intelligence Agency, this cannot be ignored as dicta, if you go to read that, we have time and again said this is what the CIA has and we are trying to give it to another agency.

QUESTION: The problem with that is what Judge Scalia said in his long defense about legislative history, after the fact observations by staff people of one House is really not much guidance—

MS. BIDDLE: Well—

QUESTION: —is not the way we ought to construe facts, to look at staff reports that are not—

QUESTION: He took that from a Senator, from Senator Armstrong.

MS. BIDDLE: This legislative history, though, if you look at it, it is also saying we have just reviewed the CIA's termination authority, and they are not changing it.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 202037 60209

AMICUS CURIAE

BRIEF

No. 86-1294

Supreme Court, U.S.
FILED
NOV 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM H. WEBSTER,
DIRECTOR OF CENTRAL INTELLIGENCE,
Petitioner,

v.

JOHN DOE,
Respondent.

BRIEF AMICI CURIAE OF NOGLSTP (NATIONAL ORGANIZATION OF GAY AND LESBIAN SCIENTISTS AND TECHNICAL PROFESSIONALS) AND LOS ANGELES LAWYERS FOR HUMAN RIGHTS IN SUPPORT OF RESPONDENT

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BRIEF OF NOGLSTP (NATIONAL ORGANIZATION OF GAY AND LESBIAN SCIENTISTS AND TECHNICAL PROFESSIONALS) AND LOS ANGELES LAWYERS FOR HUMAN RIGHTS

INTEREST OF AMICI CURIAE

This brief amici curiae in support of Respondent John Doe is submitted on behalf of NOGLSTP (National Organization of Gay and Lesbian Scientists and Technical Professionals) and Los Angeles Lawyers for Human Rights. NOGLSTP is a national organization of Gay men and Lesbians employed or interested in scientific or high-technology fields. Los Angeles Lawyers for Human Rights is an organization of attorneys in Los Angeles, California.[1]

In this brief, Amici provide the Court with information demonstrating that unwarranted discrimination and unjustifiable procedures used against Gays and Lesbians by the Government in making security clearance determinations is producing an adverse impact on individuals and the national interest, and also why such practices, although unconstitutional, are not ripe for consideration by this Court despite the Government's contentions.

SUMMARY OF ARGUMENT

Respondent John Doe[2] was employed by the CIA for nine years, and was consistently rated as an excellent or

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[1]The qualifications of NOGLSTP and Los Angeles Lawyers for Human Rights as Amici are set forth in the Appendix I to this Brief.

[2]John Doe is proceeding under a pseudonym only because his status as a CIA employee cannot be publicly acknowledged, not because of any embarassment about his being Gay.

outstanding employee. The CIA expressed no dissatisfaction with Doe's work or his loyalty. However, after Doe voluntarily informed the CIA that he is Gay, the CIA fired him. Doe then brought this case to get his job back. CIA officials gave conflicting accounts about whether the CIA fires all known Gays and Lesbians, or considers each on a case-by-case basis.[3] The Government has argued that Doe was fired for not telling the Government sooner that he is Gay, and not answering unreasonable questions.[4]

Although the Government asked for review in this Court on the narrow question of whether CIA employment decisions are subject to judicial review, the Government also presented arguments about blackmail susceptibility, Gays and Lesbians as security risks because they are susceptible to blackmail, and the constitutional rights of Lesbians and Gays. These are very important, multifaced issues which will greatly affect many people. This particular case has not had enough background facts presented in the lower courts to allow this Court to make fully informed decisions on the blackmail, security risk, and constitutional issues argued by the Government. This Court should instead focus its attention on the main issue, that of judicial review of CIA decisions, an issue which is not argued in this brief. This

[3]Brief for the Petitioner 4, *Webster v. Doe*, No. 86-1294 (1987).

[4]In response to a cross-petition for certiorari in this case, the Government has argued that Doe was aware of the CIA's "concerns", namely "the duration and frequency of Mr. Doe's sexual activity, his failure to reveal his homosexuality to the Agency for six years, and his unwillingness to identify his homosexual partners." Memorandum for the Respondent in Opposition 4-5 n. 4, *Doe v. Gates*, No. 86-1442 (1987). In a case like this, one court stated that "the identity of sex partners is not to be insisted upon, unless in a particular case some special reason can be held to justify it." *Gayer v. Schlesinger*, 490 F.2d 740, 752 (D.C. Cir. 1973). The Government advances no special reason to ask Doe such questions, and there appears to be none.

brief also describes, in detail, why Gays and Lesbians are not security risks, and demonstrates that there are strong constitutional arguments for the rights of Gays and Lesbians.

ARGUMENT

I. UNJUSTIFIED DISCRIMINATION IN NATIONAL SECURITY RELATED JOBS WILL HARM SCIENTISTS, ENGINEERS, AND THEIR EMPLOYERS.

Because of the unique character of scientific and engineering work in the U.S., a policy of unjustified discrimination against Lesbians and Gays by the Government in granting security clearances will produce adverse effects on large numbers of individuals and employers. The effects on non-technical people already working on national security projects will also be severe.

A. Many Scientific and Engineering Jobs Require Security Clearances.

The federal government has been involved in much of the scientific and engineering work in this country, and has actively promoted reliance on defense related research as the source of technological innovation. According to one study, during 1968 approximately 19% of total employed engineers in the United States were engaged in defense-generated employment, and the addition of the indirect effect upon this employment increases the percentage to approximately 30%. W. Torpey, *Optimum Utilization of Scientific and Engineering Manpower* 267 (1970). Many specialized fields of technical work virtually require a government issued security clearance. Large numbers of scientists and engineers rely on their ability to maintain a security clearance. General Accounting Office figures show that, as of December 31, 1983, approximately 2,725,000 government civilian and military personnel had security

clearances, and over 1,500,000 additional contractor employees had such clearances. *Federal Government's Security Clearance Programs*, S. Rep. No. 230, 99th Cong., 2nd Sess. 2 (1986). The same report indicates that one of the highest types of clearances, for sensitive compartmentalized information (SCI), is held by 111,167 Department of Defense employees, and by an additional 10,808 defense contractor employees.

Very large numbers of scientific and engineering employees are required to have government security clearances. Undoubtedly, a significant number of such employees are Gay or Lesbian. This demonstrates that a categorical prohibition of clearances for Gays and Lesbians will have a large, damaging effect on those individuals.

B. Employers of Scientists and Engineers Have a Difficult Time Recruiting Qualified Employees.

Based on statistical studies, employers are reporting shortages of scientists and engineers in many fields. One study from the University of Illinois reported that the "shortage of engineers" will continue to be one of the many unresolved problems with which we live, but the economy has adapted in the past by: (1) increasing the relative salary levels of engineers and scientists, and (2) concentrating the employment of engineers and scientists in the military industries. H. Folk, *The Shortage of Scientists and Engineers* 261 (1970). A review of the current "help wanted" advertisements in major newspapers demonstrates the intense competition for skilled scientists and engineers among defense contractors. In a country committed to economic growth, and committed to equipping its military with the best of technology, it is important that an effective supply of scientists and engineers be available.

Categorical discrimination against Gays and Lesbians in national security related occupations would have a large effect on many employers.[5]

II. THIS CASE DOES NOT HAVE ADEQUATE FINDINGS BY THE LOWER COURT TO PERMIT REVIEW OF THE CIA'S ADMINISTRATIVE ACTIONS AND SHOULD BE REMANDED FOR FURTHER FACT FINDING.

Certiorari was granted in this case on the narrow issue of whether employment discharges by the CIA are subject to judicial review. However, the Government has also presented additional arguments that CIA employees who are susceptible to blackmail should be fired, and that there is no arguable constitutional protection for homosexuals from such firings because homosexuals are exposed to possible blackmail. Brief for the Petitioner 23, 28 n. 23, *Webster v. Doe*, No. 86-1294 (1987). Such contentions are not directly related to the question presented for review by this Court, and cannot be resolved summarily as argued by the Government.

This brief is presented by Amici to demonstrate that the Government's arguments concerning blackmail susceptibility and constitutional rights for Gays are not ready for decision

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[5] In response to a cross-petition for certiorari in this case, the Government has argued that the outcome of this case will not have an effect on federal employees beyond those in particular intelligence agencies (CIA, NSA, DIA, and civilian intelligence employees or officers of a military department). Memorandum for the Respondent in Opposition 10-11, *Doe v. Gates*, No. 86-1442 (1987). However, the same ill-founded rationale for discrimination against Lesbians and Gays persists in the granting of security clearances to civilian defense contractor employees, and even in the hiring of FBI agents.

in this case, and that the Government's arguments are ill-founded.

There are many fact findings which need to be made before this Court could decide the security risk and constitutional issues which the Government is arguing. Findings are needed to establish what the actual CIA policy on firing Gays is[6], that the blackmail susceptibility theory is ill-founded, that Gays are not security risks through blackmail, and what the factual context is for Gays under various constitutional protections. The Supreme Court has often refused to decide such issues, determining instead that the issues are not ripe for decision in the particular case presented.[7] When the issues raised are important and fact dependent, as they are here, the best practice is to await illuminating factual detail before proceeding to decide. This is particularly important when parties not in this case will be affected by a decision, such as the parties in the pending cases discussed below who have pertinent facts relating to Gays and the blackmail, security risk, and constitutional issues argued by the Government. This case is not ripe for decision on these issues because of the inadequate record on the "past fact"[8] of what the actual CIA policy of firing Gays

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[6]The Circuit Court stated that it was remanding this case because it could not determine if the CIA fired Doe (a) because of reasons unrelated to Doe's homosexuality; (2) because the CIA fires all homosexuals; or (c) because the CIA thought that Doe's homosexuality presented a security risk [implying that homosexuality would present a risk only in the case of certain individuals]. *Doe v. Casey*, 796 F.2d 1508, 1521-2 (D.C. Cir. 1986). It left the District Court with the task of finding out if the CIA had a policy of firing all Gays and Lesbians. *Id.* at 1522.

[7]*See, e.g.*, the discussion and cases cited in 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 3532.3 (1984).

[8]*Id.* at n 7.

is. Simply put, this case does not have an adequate record for making important decisions on multifaced issues of national security employment criteria, and constitutional rights of Lesbians and Gays.

In *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974), this Court found that a First Amendment challenge to federal regulations requiring bank recordkeeping and reporting was premature. It held that since the Government had not yet sought disclosure of the records, the Court did not have a "concrete fact situation in which competing associational and governmental interests can be weighed." *Id.* at 55-6. In *Elder v. Brannan*, 341 U.S. 277 (1951), this Court decided a case concerning statuory preferences for veterans in civil service employment by remanding to the lower court for "missing links in allegations and proof" concerning a claim of discrimination. *Id.* at 289. In *U.S. v. Fruehauf*, 365 U.S. 146 (1961), this Court refused to reach a question of statutory interpretation when the Government's contentions were unclear, and the case was remanded for trial. *Id.* at 155-7, 159. The Court stated:

> [s]uch [advisory] opinions, such advance expressions of legal judgement upon issues which remain unfocused because they are not pressed before the Court with that clear correctness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give. [Citations omitted.] *Id.* at 157.

The constitutional and blackmail issues raised by the Government in the present case lack the "concrete facts" required by *California Bankers*, are missing the proof

required by *Elder*, and do not have the focus of issues produced through adversary argument required by *Fruehauf*. Therefore, this Court should similarly refuse to reach such issues as premature.

This Court has decided in the past to honor the separation of powers, and avoid deciding unnecessary constitutional issues, by invoking the ripeness doctrine to avoid rendering a decision absent a genuine need to resolve a real dispute.[9] The Court should avoid summarily deciding the constitutional rights of Gays in this case, as argued by the Government, but should instead wait until the issue is fairly presented and given an opportunity for full factual and legal explanation.

Because the factual record in this case is not fully developed, and the actual CIA policy on firing Gays and Lesbians is unexplained, it is difficult to determine the actual issues contested between Doe and the CIA.[10] This Court should defer addressing the issues argued by the Government until the true issues of difference are clarified. To do otherwise is to risk merely providing an advisory opinion.[11]

In announcing its decision in favor of Doe, the District Court stated that "when a federal employee is dismissed for reasons associated with homosexuality he is entitled to fair treatment and should be afforded all available and prescribed

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[9]*See, e.g.*, the discussion and cases cited in 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d.* § 3532.1 n. 13 (1984).

[10]The Government's contentions on why Doe was fired from the CIA are listed in footnote 4 above, and are not the same as the Circuit Court's understanding listed in footnote 6 above.

[11]An appellate court should refuse to provide advisory opinions on issues not yet properly before it, or in cases calling for further proceedings. *Id.* at § 3529.

procedural safeguards."[12] *Doe v. Casey*, 601 F. Supp. 581, 587-8 (D.D.C. 1985). Because of the very preliminary state of this particular case, and the sparse record on the many aspects of the blackmail, national security, and constitutional issues argued by the Government, this Court should avoid deciding these issues. Instead, this case should be remanded to the District Court for the appropriate treatment in that court.

III. SCIENTISTS AND ENGINEERS ARE ENTITLED TO THE PROTECTION OF THE CONSTITUTION IN THEIR JOBS, INCLUDING JOBS INVOLVING THE NATIONAL SECURITY.

Merely invoking the consideration of national security does not remove all constitutional protections for government employees or employees of government contractors.

A. Cases From the 1950s McCarthy Era Illustrate the Danger to Scientists and

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[12]The District Court cited three cases concerning this right to "fair treatment", including: (1) a case involving a Gay FBI clerk in which the appeals court reversed a summary judgment in favor of the FBI, and remanded for a hearing on whether the clerk's homosexuality or behavior related to it could constitute a job-related basis for dismissal justifying discharge, *Ashton v. Civiletti*, 613 F.2d 923, 931 (D.C. Cir. 1979); (2) a case involving a Gay Air Force sergeant in which the appeals court reversed a summary judgment in favor of the Air Force, and remanded for a hearing for the Air Force to explain why the sergeant did not meet the criteria allowing some Gays to remain in the Air Force, *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978); and (3) a case involving a NASA budget analyst in which the appeals court reversed a summary judgment in favor of NASA, and allowed the reinstatement case to go forward despite a statement in the dissent, made without citing specific evidence, that the firing of Gays is justified because they are "targets for public reproach and private extortion." *Norton v. Macy*, 417 F.2d 1161, 1169 (D.C.Cir. 1969).

Engineers of Unjustifiable Discrimination.

The infamous purges of U.S. government employees during the McCarthy era, based on allegations of threats to national security, did not sidestep scientists and engineers. The ouster of Dr. John Peters as a consultant to the U.S. Public Health Service, after allegations relating to Communism, was successfully challenged in the Supreme Court. *Peters v. Hobby*, 349 U.S. 331 (1955). A federation of thirteen labor unions representing scientists and engineers in the defense industry filed an amicus brief in that case, arguing for minimum fairness due process hearings in the government loyalty and security program.[13] When Dr. Edward Condon, one of the country's leading physicists, was denied a security clearance, the denial was criticized by prominent scientific organizations.[14] Noted scientists, including Dr. Vannevar Bush and Dr. Lee DuBridge, openly criticized the government's security program.[15] One of the country's preeminent computer scientists, Dr. John von Neumann, argued for judicial safeguards and stated "[v]ery many people who have some trivial blot way back in their past do not know whether they can take a chance on getting

[13] *High Court Urged to Set Safeguard in Loyalty Cases*, N.Y. Times, Dec. 28, 1954, at 1, col. 1.

[14] The president of The American Association for the Advancement of Science criticized the treatment of Dr. Condon. *Scientist Decries Curb on Condon*, N.Y. Times, Dec. 29, 1954, at 14, col. 2. Similar criticisms were voiced by the council of the Federation of American Scientists. *Chemists Propose Study of Security*, N.Y. Times, Jan. 31, 1955, at 8, col. 5.

[15] V. Bush, *If We Alienate Our Scientists—*, N.Y. Times, June 13, 1954, § 6 (Magazine), at 9; *Science and Government*, N.Y. Times, March 27, 1955, Part IV, at 10, col. 3.

into sensitive work, although the matter may be irrelevant and they could do very good work in this area."[16]

The kinds of concerns which troubled scientists and engineers generally in the McCarthy era continue to trouble Gays and Lesbians who need government security clearances today.

B. National Security Has Been Used Unfairly as an Excuse in the Past for Discrimination Against Gays and Lesbians.

During the 1950's, gays and lesbians were purged from government employment, often based on a perceived threat to national security, and often for political reasons. The more recent policy of the CIA concerning gay and lesbian employees was reported to have been influenced by political considerations.

FBI Director Hoover stated that the Federal Employee Security Program started in 1953 differed from earlier programs, in that "non-loyalty" items concerning "derogatory personal habits, conditions, and acts" were to be considered along with the more conventional "loyalty" items.[17] "Sexual perversion" was listed as an item of "non-subversive derogatory character" in that program.[18] Even before this purge was launched, Director Hoover reported that by April 1, 1950, the FBI had identified 406 "sex deviates in government service."[19] The State Department reported on March 25, 1952 that, since January 1, 1951, it

[16] *Dr. Bush Says 'Risk' System Has Demoralized Scientists*, N.Y. Times, Oct. 19, 1954, at 1, col. 2 (quotation at 12, col. 4).

[17] J. Hoover, *Role of the FBI in the Federal Employee Security Program*, 49 N.W. Univ. L. Rev. 333, 336 (1954-55).

[18] *Id.* at 336.

[19] *F.B.I Checks 3,225,000 For U.S. Jobs; 299 Ousted*, N.Y. Times, April 28, 1951, at 7, col. 3.

had discharged 126 homosexuals, and that "there is no doubt in our minds that homosexuals are security risks."[20] However, a listing published in 1955 showed, for a sixteen month period, that 655 "security separations" occured for "perversion", and included employees from such obviously non-sensitive agencies as the Agriculture Department and Post Office.[21] Press coverage of the highly political nature of the purge of Gays and Lesbians from government employment during the McCarthy era is summarized in J. Katz, *Gay American History* 91-105 (1976)[22]. Given the way the purge of Gay and Lesbian employees was politicized, and the non-security jobs involved, it is clear that prejudice rather than security concerns played a major role.

A detailed study of the bureaucratic structure involved in the government's security clearance procedure concluded that "[o]nce the government is required to justify its exclusion of homosexuals on reasoned, scientifically-documented grounds, perhaps those individuals whose sexual preferences differ from those of the majority will no longer be discriminated against in the government-controlled employment in the private sector." Note, *Security Clearances for Homosexuals*, 25 Stan. L.Rev. 403, 429 (1973).

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[20]*126 Perverts Discharged*, N.Y. Times, March 26, 1952, at 25, col. 4.

[21]*List of Security Separations*, N.Y. Times, January 4, 1955, at 14, col. 4-5.

[22]Katz reports that some politicians complained that the Democratic administration was lax in firing homosexuals. *Id.* at 91-105. Senator Dirksen went so far as to ridicule Democratic Presidential nominee Stevenson by declaring that the "lavender lads" of the State Department were Stevenson's associates. *Senators to Reply to Stevenson Gibe*, N.Y. Times, August 5, 1952, at 13, col. 1.

IV. THERE IS NO BASIS FOR A CATEGORICAL EXCLUSION OF GAYS AND LESBIANS FROM JOBS INVOLVING THE NATIONAL SECURITY, AND CONSTITUTIONAL PROTECTIONS APPLY TO SUCH JOBS.

The exclusion of all Gays and Lesbians from jobs involving the national security would be an arbitrary deprivation, and without rational basis. The CIA has not proved any basis in this case for a policy of discriminating against gays and lesbians.

A. A Categorical Exclusion of Gays and Lesbians as Being Susceptible to Blackmail is Unjustified.

The Government has argued that CIA employees who are susceptible to blackmail must be subject to swift removal for "reasons...too obvious to call for enlarged discussion"[23] The Government has used that argument in this case by quoting a previous finding, made without citing evidence, that such blackmail susceptibility applies not only to many Gays, but even to "open" Gays who acknowledge their sexual orientation.[24] However, the available facts show that such a conclusion is false.

The arguments by the Government are untenable because: first, blackmail is not a significant source of security

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[23]Brief for the Petitioner 23, *Webster v. Doe*, No. 86-1294 (1987), citing *CIA v. Sims*, 471 U.S. 159, 170 (1985).

[24]"It is not irrational for the Bureau [FBI] to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes many homosexuals, even 'open' homosexuals, to the risk of possible blackmail to protect their partners, if not themselves." Brief for the Petitioner 27-8 n. 23, *Webster v. Doe*, No. 86-1294 (1987), quoting *Padula v. Webster*, 822 F. 2d 97, 104 (D.C. Cir. 1987).

breaches; second, criminalization of homosexual conduct does not significantly increase the risk of security breaches through blackmail; third, any "public opprobrium" against Gays or Lesbians does not significantly increase the risk of security breaches through blackmail; and fourth, Lesbians and Gays, and particularly "open" Lesbians and Gays have not been security risks through blackmail.

First, blackmail in any context is not a significant cause of security breaches. This fact may, at first blush, seem counter-intuitive and hard to believe. However, the Government's own expert has stated that spies work in quite a different way, and generally rely on inducements to produce treachery. Declaration of John F. Donnelly ¶ 8, reprinted as Appendix II to this brief. The actual techniques generally used by spies in the U.S. are usable with Gays and non-Gays alike, and do not rely on any particular susceptibility. Most security breaches result from romantic involvements, for monetary gain, or occasionally from political convictions. Blackmail may be used to extort money from individuals, but is not ordinarily used to produce security breaches. In evaluating KGB conduct, the Senate Intelligence Committee found that "[b]lackmail is a last resort. The most common motivation is financial gain."[25] "Blackmail produces the least satisfactory, because least willing, sort of agent."[26] However, "in [c]ommunist countries where hostile intelligence services control the total environment[,] [e]ntrapment through contrived...[s]exual entanglements, currency exchange violations and black

[25]*Meeting the Espionage Challenge: A Review Of United States Counterintelligence and Security Programs*, S. Rep. No. 522, 99th Cong., 2nd Sess. 26 (1986).

[26]*Id.* at 27.

market involvement are favorite recruitment ploys."[27] Therefore, susceptibility to blackmail is not a large security risk, the instances of sexual blackmail involve contrived entanglements outside the U.S., and do not involve blackmail based on an individual's sexual acts with consenting adults in private.

Second, criminalization of homosexual conduct does not produce security breaches by providing an opportunity for blackmail. About half the states in the U.S. have laws which state penalties for consenting adults engaging in private homosexual intercourse, but only six have specific statutes that explicitly prohibit homosexual conduct.[28] A Gay defense industry employee successfully challenged the Government's refusal to issue him a "secret" clearance, and the Court of Claims upheld findings that "criminal [Gay sexual] conduct alone did not warrant denying...[him] a clearance" and his "activities would not be likely to subject him to coercion, influence, or pressure which might cause him to take action contrary to the national interest." *Tabler v. U.S.*, 2 Ct. Cl. 474, 481 (1983). In his concurrence in *Hardwick*, Justice Powell noted that "[t]he history of non-enforcement suggests the moribund character of laws criminalizing this type of private, consensual [Lesbian or Gay sexual] conduct." *Bowers v. Hardwick*, 106 S. Ct. 2841, 2848 n. 2 (1986). Justice Powell also stated in his concurrence that a "prison sentence for such conduct—certainly a sentence of long duration—*would* create a serious Eighth Amendment issue [as an infliction of cruel or unusual punishment]." [Emphasis added.] *Id.* at 2847. The

[27]*Id.* at 27.

[28]See, Note, *Survey on the Constitutional Right to Privacy In The Context of Homosexual Activity*, 40 U. Miami L. Rev. 521, 524-5 n. 9-10 (1986).

magnitude of penalties even arguably applicable to Gay or Lesbian sexual conduct are minor in comparison to the magnitude of penalties applicable to a breach of security. It is incredible to postulate that a blackmail threat of telling the police that someone is Gay would induce that person to risk violating national security laws which have very harsh consequences.

Third, any "public opprobrium" against Gays and Lesbians does not significantly increase the risk of security breaches through blackmail. "Public opprobrium" in the form of bias and hatred against Gays and Lesbians has greatly diminished in the last twenty years in the U.S. Current surveys show widespread public toleration. There are numerous public figures including judges, lawyers, doctors, congressmen, state legislators, etc. who are open, acknowledged Gays and Lesbians. Just as pockets and instances of racial and religious bigotry persist in the U.S., bias and hatred against Gays and Lesbians will continue. There is still widespread prejudice against Gays and Lesbians, and a stigma remains, but the consequences of being publicly identified as Gay or Lesbian are miniscule in comparison to the consequences for violating the national security laws. There is no established liklihood that public bias against Gays and Lesbians will lead to blackmail or security breaches.

Fourth, there are no facts to support any belief that all Lesbians and Gays, and particularly not "open" Lesbians and Gays are susceptible to blackmail. The "Crittenden Report" stated over thirty years ago that "[a] third concept which persists without sound basis in fact is the idea that homosexuals necessarily pose a security risk."[29] The super-

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[29] *Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing With Homosexuals, 21 December 1956 - 15 March 1957* 6 (a U.S. Navy board chaired by Captain A.H. Crittenden, Jr., U.S.N.) This report was originally marked "For Official Use Only", but was released through the Freedom of Information Act in 1984.

secret National Security Agency allowed a Gay man to continue access to highly classified material provided that he would "tell his family about his homosexuality, to reduce the risk he could be blackmailed into divulging secrets."[30] Under rules recently adopted, the Department of Defense has announced, in a section of its rules dealing with "Vulnerability to Blackmail or Coercion", that its security concern is with persons who *conceal* or attempt to *conceal* their sexual orientation [i.e., it is not concerned with "open" Gays or Lesbians].[31] A Pentagon security policy specialist has stated that "homosexuals who do not try to hide their sexual orientation have received clearances under the new rules, because they are not considered susceptible to blackmail."[32] A very recent decision in a class action case ruled against the Government's argument that Gays and Lesbians are security risks as being subject to blackmail. *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 2 Indiv. Empl. Rights Cas. (BNA) 633, 644 (N.D. Cal. 1987). However in *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987), the FBI's practice of refusing to hire even "open" Lesbians and Gays was approved, but without citing specific evidence, on the grounds they risk possible

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[30] *Homosexual to Keep High-Security Job*, Wash. Post, Dec. 30, 1980, at A1, col. 1.

[31] 32 CFR Part 154, Appen. H, printed in 52 Fed. Reg. 11219, 11251 (April 8, 1987).

[32] *Pentagon Asking Employees About Sexual Practices*, N.Y. Times, May 14, 1987, at A18 (quoting Peter Nelson).

blackmail to protect their partners, if not themselves. *Id.* at 104. The conclusion in *Padula* is not supported by any evidence, and is readily controverted as explained in this brief.

No case better demonstrates the irrationality of the Government's efforts to use allegations of blackmail susceptibility to get rid of Gays than *Grimm v. Laird*, No. 173-71 (D.D.C. September 27, 1971). This case was contemporaneous with *Gayer v. Laird*, 332 F. Supp. 169 (D.D.C. 1971), also decided by Judge John H. Pratt. Dr. Grimm was a physicist who held a "Q" clearance from the Atomic Energy Commission from 1950 to 1957 and a Secret clearance from the Department of Defense from 1958 to 1964 with an unblemished record of safeguarding classified information entrusted to his care. *Grimm, supra* finding of fact 4, 5. In 1961, he commendably rejected a blackmailer's demand for a mere $50, and his homosexuality was reported to the FBI as a result. *Id.* findings 6, 7. After holding clearances for over 13 years, Dr. Grimm was finally questioned about homosexual conduct by Government agents and freely declared such conduct in a written statement. *Id.* finding 9. Nonetheless, the Government suspended his clearance based solely upon homosexuality, but failed to state any relationship between it and his ability to protect classified information. *Id.* finding 10. The district court therefore concluded that Grimm's due process rights had been violated and remanded the case to the Department of Defense for further processing. *Id.* conclusions of law 4, 5.

Note carefully that the Government actually attempted to punish a Gay man, despite his resistance to even "ordinary" blackmail (blackmail for money), and when "classified" blackmail (blackmail for classified information) was not even involved. For a mere $50, Dr. Grimm could have preserved

his clearance without violating any law or regulation, criminal or otherwise. On the other hand, stiff prison sentences face anyone who improperly divulges classified information, whether in response to blackmail (unlikely) or because of personal greed (very likely). *See, e.g.*, 18 U.S.C. § 794(b) (espionage punishable "by death or by imprisonment for any term of years or for life"). Since Dr. Grimm demonstrated his high moral character by resisting ordinary blackmail, *a fortiori* he would never have succumbed to classified blackmail (assuming, *arguendo*, that the KGB uses such a method).

B. Successful Challenges Are Being Made to the Stereotype of Gays and Lesbians as Security Risks Through Blackmail.

The contention by the Government that Lesbians and Gays are particularly susceptible to blackmail is the subject of vigorous dispute in many cases now pending. In one of those cases, the Government has been literally compelled to admit that it had no information indicating that any person had succumbed to Gay-related blackmail by divulging classified information. *High Tech Gays v. Defense Indus. Sec. Clearance Off.*, No. C 84-6078 TEH (N.D. Cal.)(answer to interrogatory 10)[33]. Even the CIA admitted

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[33]The interrogatory read as follows: "Identify all Gay applicants who are known to you to have been victims of blackmail *attempts* based on factors relating to their sexual orientation or private practice thereof with consenting adults, and set forth these factors in each such case. Identify all such victims who actually complied with any of the demands of the blackmailer (and thereby gave him something of value). Of these, identify all such compliant victims who gave classified information to blackmailers." The Government's initial response was to object to the interrogatory on a variety of grounds, but it did file a further answer stating: "Other than the blackmail attempt described in plaintiff Dooling's investigative file, *defendants do not have additional information on gay applicants for industrial security clearances in the*

that it had no information indicating that a Gay person had succumbed to indirect blackmail (to protect a homosexual

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United States who have been victims of blackmail or blackmail attempts based on their sexual orientation. However, defendants have not made a manual, record-by-record search of all files of gay applicants for, or holders of, industrial security clearances, for the reasons specified in their [initial] answer to Interrogatory No. 10. The defendants are aware of a criminal prosecution in the United Kingdom during 1985 of two soldiers and five Royal Air Force enlisted members who were alleged to have passed sensitive information to foreign intelligence agents. Although the seven British servicemen were acquitted of these charges, the prosecution presented evidence that the ring was initiated by blackmail of a homosexual airman who brought others into the ring by holding orgies at which drugs were used, and photographs taken." [Emphasis added.] This halfhearted attempt to find evidence, any evidence, even evidence in a losing case from a foreign country, is probably a reference to the same case which caused a scandal on investigative misconduct and questionable testimony. *See*, S. Pendler & R. Cowton, *How RAF Interrogators Forced Men to Say What They Wanted to Hear*, Times of London, Oct. 29, 1985, at 2, col. 2.

partner from disclosure). *Dubbs v. CIA*, No. C 85-4379 EFL (N.D. Cal.)(answer to interrogatory 4)[34].

The Pentagon has provided evidence contrary to the contention that blackmail makes Gays and Lesbians security risks. John Donnelly, the Assistant Deputy Under-Secretary of Defense for Counterintelligence and Security, submitted a Declaration in *High Tech Gays, supra*, dated September 1, 1987 (appended to this brief as Appendix II). The declaration was an attempt to justify the Department of Defense practice of discriminating against Gays in security clearance processing. It included an admission by Donnelly that hostile intelligence agencies "usually spot individuals with the desired access and *then* assess them in order to

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[34]The interrogatory read as follows: "At the end of the first paragraph on page two of the Kotapish letter, you mention the possibility that Dubbs may have 'a partner who is not an open homosexual and who fears public exposure'. Please set forth all factual evidence showing since 1970 that a Gay person succumbed to coercion, pressure, or blackmail based on the public exposure of such a partner. In addition, please describe the application of the Adjudication Guidelines on 'Cohabitation' in Annex A to DCID 1/14 (27 November 1984) to the 'partner' situation mentioned above." The response provided by the Government was "Defendants do not have all factual evidence show[illegible], since 1970, the 'Gay' persons that have succumbed to coercion, pressure, or blackmail based on the public exposure of a partner. As to those circumstances not involving a national security context, that information is as available to the public as to Defendants. As to those circumstances which do involve a national security context, all factual evidence as to any such instances of successfull recruitment would be in the possesion of hostile intelligence services. Accordingly, *we do not have such information.* The Adjudication Guidelines on 'cohabitation' in Annex A to DCID 1/14 (27 November 1984) must be applied in the context of an entire set of facts, considering all relevant factors and their interrelation to one another. Consequently it is impossible to determine how the Guidelines would apply with respect to this one isolated factor." [Emphasis added.]

determine the most effective approach...Blackmail may sometimes be used *after* the person is already compromised, but generally the initial efforts of exploitation centers [sic] around *enticing* the targeted individual with money, sexual favors [heterosexual or homosexual, as appropriate], treatment for alcoholism [not homosexuality], etc." *Id.* declaration ¶ 5 [Emphasis added]. He also reports on two recent cases where Gays and Lesbians were involved, but no classified information was compromised, and one of which involved a Lesbian who promptly reported a KGB blackmail attempt to "the proper U.S. authorities". *Id.* declaration ¶¶ 7, 8. The conclusion is clear, blackmail for classified information is rare, and Gay people do not succumb thereto even when it is used.

Contrary to the assertions in this case[35] that the CIA has the ability to assess and judge whether individuals could be compromised, Donnelly makes a surprising admission that the Government lacks expertise in the very area under consideration, and states that security clearance research is currently underway at the Personnel Security Research and Education Center. *Id.* declaration ¶ 10. He states, "preliminary results of our efforts has accomplished little other than to suggest that it may be impossible to develop a profile of a spy. Every person is different." *Id.* A security consultant for the Navy put it bluntly: "Adjudicators are flying blind. They don't know the relationship between certain classes of behavior and later behavior." *Federal Government Security Clearance Programs: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, S. Hrg. No. 166, 99th Cong., 1st Sess. 367 (1985). Certainly no court owes deference to

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[35]Brief for the Petitioner 16-17, *Webster v. Doe*, No. 86-1294 (1987).

administrative decisions without competent basis, especially when such incompetence is admitted repeatedly by the Government itself.

It would be improper for this Court to adopt the Government's contention that Gays and Lesbians are particularly susceptible to blackmail and therefore should be considered security risks. Such is especially the case where evidence from the Government itself shows that blackmail of Gays and Lesbians is not a security problem. The matter is the subject of vigorous ongoing litigation in other cases, and the Government's contention is being successfully attacked. This Court should abstain from adopting the Government's contention about blackmail in this case, since this case has neither the record nor the sufficiently developed background for such a determination.

C. Important Constitutional Claims Have Been Raised By Doe, But Decision On Those Claims Would Be Premature.

Prior to this Court's decision in *Hardwick*, at least two well respected law reviews published notes presenting arguments for applying constitutional protections to prohibit discrimination against Gays and Lesbians.[36] Subsequent to *Hardwick*, at least one more well respected law review has

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[36]A note from the Southern California Law Review argues for a heightened scrutiny equal protection standard and that "the judiciary must mitigate the official forms of discrimination gays face." Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 So. Cal. L. Rev. 797, 835 (1984). A note from the Harvard Law Review argues that homosexuality be considered a suspect classification entitled to the protection of heightened constitutional scrutiny by the courts in reviewing discriminatory laws. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1287 (1985).

published a comment presenting such arguments.[37] What is significant is that each of these law review articles presented large amounts of evidence culled from publications. The evidence necessary in this case to analyze the constitutional issues has not yet been presented because of the very preliminary status of the record.

Constitutional doctrine has already been applied in two post *Hardwick* security clearance cases to prohibit discrimination against Gays and Lesbians. In the case of a Gay White House stenographer who had his security clearance revoked, a court found that he was entitled to constitutional protection against the discrimination because "the government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all." *Swift v. U.S.*, 649 F. Supp. 596, 602 (D.D.C. 1986). Constitutional protections against discrimination were also successfully invoked in a class action dispute on behalf of Gays and Lesbians who challenged delays in the Government's granting of security clearances. *High Tech Gays v. Defense Indus. Sec. Clearance Off.*, 2 Indiv. Empl. Rights Cas. (BNA) 633, 637-46 (1987). These cases illustrate that a full review of constitutional issues in security clearance cases requires extensive factual review and argumentation. Such a review is not possible on the limited factual record in this case.

The Government itself has stated that the substantive constitutional issues in this case were not decided by the lower courts.[38] However, the Government has argued, in a single footnote, and without citing evidence, that the

[37] A comment from the Loyola of Los Angeles Law Review argues that Gays and Lesbians deserve constitutional strict scrutiny equal protection. Comment, *Bowers v. Hardwick: A Giant Step Back for Privacy Rights*, 20 Loyola L.A.L. Rev. 1023, 1048-9 (1987).

[38] Brief for the Petitioner 7, *Webster v. Doe*, No. 86-1294 (1987).

substantive constitutional claims raised by Doe are not even *arguable*.[39] Certainly strong arguments have been made in the past for such claims, and such arguments were successful in the recent *Swift* and *High Tech Gays* cases cited above. The subtantive constitutional claims in this case should be reserved for a full airing in a court suited to perform the needed fact finding, and should not be dismissed summarily as argued by the Government.

CONCLUSION

The opinion of the Circuit Court should be affirmed, and this Court should refrain from ruling, as a premature issue, on the constitutionality of any CIA policy of discriminating against Gays and Lesbians.

Respectfully submitted.

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The help of FRANKLIN E. KAMENY and ANNE WEILLS (a Golden Gate University Law School student) was important for this brief, and grateful thanks are extended.

[39] *Id.* at 27-8 n. 3.

APPENDIX I

INTERESTS OF AMICI CURIAE

This brief amici curiae is submitted on behalf of NOGLSTP (National Organization of Gay and Lesbian Scientists and Technical Professionals) and Los Angeles Lawyers for Human Rights.

NOGLSTP is a national organization of Gays and Lesbians employed or interested in scientific or high technology fields. NOGLSTP's goals include dialog with professional organizations, disseminating information, bettering its members' employment and professional environment, opposing anti-Gay/Lesbian discrimination and stereotypes, educating the Gay, scientific, and general communities, and fostering inter-city contacts among its members. NOGLSTP has both individuals and organizations as members. Supporting organizations include Los Angeles Gay and Lesbian Scientists (LAGLS), Gay and Lesbian AIDS Scientists (GLAS), and Gay and Lesbian Orange County [California] Engineers and Scientists (GLOES). Affiliated organizations include Gaytek (Philadelphia), Humboldt Society (Philadelphia), Natural History Group (New York), NOAGLES (New Orleans), WAGLS (Washington, D.C.), and TAGS (North Carolina).

Los Angeles Lawyers for Human Rights (LHR) is an affiliate of the Los Angeles County Bar Association. LHR was organized in 1976 to provide a focal point from which to address human rights issues which have an impact on the Gay and Lesbian community. LHR is made up of judges, attorneys, and law students from diverse backgrounds. LHR participated as *amicus curiae* in *New York v. Uplinger,* 104 S. Ct. 2332 (1984), *Board of Education v. National Gay Task Force,* 105 S. Ct. 1858 (1985), and *Bowers v. Hardwick,* 106 S. Ct. 2841 (1986). As an organization of

attorneys, LHR recognizes and is concerned about the overall discriminatory effect of laws which penalize the private affectional behavior and intimate association of adults, especially in such areas as employment, public accomodations, housing, parenting, and delivery of governmental services.

APPENDIX II

DONNELLY DECLARATION

The following is a reprint of the text of the DECLARATION OF JOHN F. DONNELLY IN SUPPORT OF DEFENDANTS' MOTION FOR NEW TRIAL/RELIEF FROM JUDGEMENT, dated October 15, 1987, and filed in the pending case *High Tech Gays v. Defense Indus. Sec. Clearance Off.*, C-84-6078-TEH (N. D. Cal.).

I, John F. Donnelly, declare:

1. I currently serve as the Assistant Deputy Secretary of Defense for Counterintelligence and Security. I am also the Acting Director for Counterintelligence and Investigative Programs, Office of the Deputy Under Secretary of Defense for Policy, Department of Defense, Washington, DC. As such, I am responsible for the management of all DoD investigative, security, and counterintelligence resources funded in the DoD portion of the National Foreign Intelligence Program and the Security and Investigative Activities Program. I am also the focal point for counterintelligence policy matters within the Department of Defense and serve as the DoD program manager for the Defense Investigative Service and the DoD Polygraph Program. Prior to my service here in DoD, I worked 30 years as a civilian special agent with the Naval Investigative Service (NIS). From July 1974 to August 1979, I served as the NIS Director for Counterintelligence with responsibility for the management and direction of NIS's world-wide counterintelligence investigative, operational, and collection activity. I am currently a member of the Senior Executive Service with a date of appointment of 2 September 1981.

2. As the Counterintelligence "Chief" for the Department of Defense, it is my responsibility to insure the Department's personnel security program remains responsive to the threats posed by hostile intelligence agencies, and to otherwise attempt to neutralize their activities. I work closely with all other federal counterintelligence services and share information vital to our operations.

3. I am aware of the established "modus operandi" of hostile intelligence services and the general characteristics of those individuals identified as being involved in espionage by virtue of the following reasons:

a. I have personally participated in numerous counterintelligence operations.

b. I am personally briefed and kept regularly updated on all counterintelligence operations ongoing within the Department of Defense.

c. I am regularly briefed on numerous other counter-intelligence operations conducted by other federal agencies.

d. I have personally debriefed, or been provided the results of debriefings, of every defector from hostile intelligence agencies since 1966.

e. I have been provided detailed briefings on, and conducted my own analysis of, every case of espionage against the U.S. and its allies since 1966.

4. Some of the facts presented in this declaration have only recently been declassified or otherwise released due to the completion of litigation.

5. Hostile intelligence efforts directed at the recruitment of individuals often involve the exploitation of what those agencies consider to be human weaknesses, indiscretions and vices. Hostile intelligence agencies, with great

consistency, consider sexuality to be a potentially exploitable vulnerability. This does not mean that hostile intelligence agencies always seek out homosexuals to target. Rather, they usually spot individuals with the desired access and then assess them in order to determine the most effective approach. They then attempt to segregate those with alcohol or drug problems, financial problems, a known disregard for security, and/or those who can be exploited sexually. Blackmail may be sometimes be used after the person is already compromised, but generally the initial efforts of exploitation centers around enticing the targeted individual with money, sexual favors, treatment for alcoholism, etc. Their techniques range from an extremely subtle softening up period to a crude frame up.

6. The most recent evidence of hostile intelligence interest in homosexuality can be found in the 28 December 1986 sworn statement of the subsequently convicted spy, Sgt Clayton Lonetree. Lonetree was compromised by the Soviet KGB and his KGB handler, Aleksiy G. Yefimov, also known as "Uncle Sasha". When queried about Sasha's attempts to compromise other U.S. personnel, Lonetree stated:

> "Sasha also asked me about the other Marines in the Guard Det. Sasha wanted to know about my personal time and then led into the other marines and if they were involved in my spare time. Sasha also wanted to know what Marines had problems with alcohol or drugs or those who were homosexual."

7. A case currently under investigation by another U.S. federal agency involves an employee with very sensitive access who was involved in a homosexual love affair with

an individual working for a major hostile intelligence organization. Fortunately, the situation was discovered before any damage to national security could result.

8. Within the last year, a member of the U.S. military with a high level clearance who was assigned to an overseas location, returned home one evening to discover two representatives of the Soviet KGB already in her residence. The KGB representatives advised our subject that, through telephone monitoring and a residential search, they were aware that she was a homosexual. They threatened to expose her unless they could obtain from her an agreement to engage in espionage for them. Fortunately, the subject refused to cooperate and, instead, contacted the proper U.S. authorities.

9. The factor of homosexuality may have been present in a number of other past occurrences of espionage by DoD personnel; however, due to the availability of other overwhelming criminal evidence, this lead was not pursued at the time.

10. The Department is currently embarked upon an aggressive personnel security research program which is being coordinated through our recently established Personnel Security Research and Education Center (PERSEREC), Montery, CA. A high priority for PERSEREC is to attempt to scientifically validate the various aspects of our personnel security program. However, establishment of a scientific nexus will be a long term project at best. In fact, preliminary results of our efforts has accomplished little other than to suggest that it may be impossible to develop a profile of a spy. Every person is different.

11. I am greatly concerned that, especially in areas such as the "Silicon Valley" of California, which is a high priority area for hostile intelligence, the Department will be precluded from even inquiring about or otherwise pursuing an issue we know from experience that our opposition finds in many cases to be exploitable and actively today still attempts to exploit. Personnel security and counterintelligence security policy endeavors to be anticipatory in nature, seeking to identify potential future targets of espionage based on previously identified personal characteristics. I believe that the court's order creates a substantial potential for grave harm to our national security.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 1st day of September 1987 at Washington, D.C.

/s/ JOHN F. DONNELLY

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
NOV 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1294

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

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Director of Central Intelligence,
Petitioner,

v.

JOHN DOE,
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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF *AMICI CURIAE* EMPLOYMENT LAW CENTER AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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November 3, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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BRIEF OF *AMICI CURIAE* EMPLOYMENT LAW CENTER AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is filed pursuant to Supreme Court Rule 36.2 with the consent of the parties.[1] *Amici curiae* have fought to eliminate employment discrimination for over fifteen years. The Employment Law Center, a project of the Legal Aid Society of San Francisco, litigates to protect the rights of women, minorities, gays, and individuals with physical disabilities in the workplace. The Women's Legal Defense Fund, a nonprofit, tax-exempt membership organization, monitors federal and state agencies charged with enforcing equal opportunity laws, counsels clients facing sex discrimination in

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[1] Letters of consent from counsel for the petitioner and the respondent have been lodged with the Clerk of the Court.

the workplace, and litigates significant employment cases. In *amici curiae*'s experience, eradicating employment discrimination is dependent in large part upon judicial review of employment determinations.

Amici curiae's interest in this case stems from the substantial importance to their constituencies of the CIA Director's claim that the National Security Act wholly exempts his employment determinations from court scrutiny. The Director's theory would sweep away employment rights guaranteed by statutes such as Title VII of the Civil Rights Act of 1964 and deny all constitutional litigants a judicial forum for their claims. Moreover, it could potentially reach all whose jobs are affected by national security or other important government interests, whether employed by the CIA, elsewhere in the federal government, or even in the private sector. In *amici curiae*'s view, the CIA Director's theory in this case threatens fundamental employment protections and challenges the most basic principles of our constitutional framework.

STATEMENT OF THE CASE

John Doe [2] brought this suit against the CIA Director, who dismissed Doe after nine years of CIA employment, allegedly because Doe is gay. The CIA Director, Doe claimed, terminated his government employment without affording the procedural protections guaranteed by CIA regulations, the Administrative Procedure Act ("APA"), and the fifth amendment due process clause. Doe also claimed that his firing violated substantive equal protection and privacy rights guaranteed by the Constitution.

Addressing solely the procedural protections due to Doe, the district court entered partial summary judgment in Doe's favor. The court of appeals found that Doe was not entitled to the procedural protections he sought. It therefore reversed the district court's order and remanded the case for a determination of the only remaining questions: whether Doe's dismissal violated his substantive constitutional rights to equal protection or privacy.[3]

[2] Prior to his termination, the CIA assigned John Doe to duties requiring that his status as a CIA employee not be publicly acknowledged. He proceeds under a pseudonym in this action for that reason, not because of any embarrassment over his homosexuality.

Although the CIA Director prevailed on all of the claims at issue in the court of appeals' review of the district court's partial summary judgment order, the Director nonetheless petitioned for certiorari on the question whether the National Security Act exempts from all judicial scrutiny the Director's decision to dismiss an employee. Doe cross-petitioned for certiorari, requesting review of the court of appeals' decision denying him the procedural protections he sought. The Court granted the CIA Director's certiorari petition questioning the availability of judicial review for Doe's discharge, but has not yet acted on Doe's cross-petition.

In his certiorari petition, the CIA Director framed the question now before the Court as:

> Whether the decision of the Director of Central Intelligence to discharge an officer or employee of the Central Intelligence Agency pursuant to the Director's authority under Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), is judicially reviewable under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701-706.

Petition at I. Unless this Court grants Doe's cross-petition seeking review of the court of appeals' decision, the availability of APA review of nonconstitutional claims is of no practical significance to this case. The court of appeals' decision disposes of Doe's nonconstitutional claims, leaving open only the questions whether

[3] Those questions—with the exception of the *sua sponte* comments the court of appeals made in connection with the remand—have yet to be addressed at all.

Doe's discharge violated his constitutional rights to privacy or equal protection. Thus, in this case's current procedural posture, what is actually posed by the CIA Director's petition is the unusually sensitive question whether Congress may preclude all judicial review of constitutional claims.

SUMMARY OF ARGUMENT

The Court should dismiss the writ of certiorari and decline to address the CIA Director's claim of exemption. Because the Director never advanced the theory urged here in the courts below, this case is ill-suited for addressing the far-reaching question he now poses.

The CIA Director asserts that his employment decisions are insulated from all court scrutiny, even when, as here, a discharged employee asserts a claim of constitutional violation. To disguise the nature and scope of the ruling he requests, the Director clothes his argument in the national security interest. He also ignores the broad range of constitutional and statutory claims that his theory would withdraw from court review and questions the strength of the constitutional rights that this plaintiff seeks to vindicate.

The CIA Director's argument challenges basic principles of our constitutional framework that require a judicial forum for review of constitutional claims. It also threatens fundamental employment protections accorded to all, whether employed by the government or in the private sector. If the Court reaches the merits of his argument, it must reject the Director's claim that his employment decisions are above the law and exempt from all review.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THIS CASE IS ILL-SUITED FOR ADDRESSING THE CIA DIRECTOR'S BELATED CLAIM THAT THE NATIONAL SECURITY ACT PRECLUDES ALL JUDICIAL REVIEW OF A CIA EMPLOYEE'S DISMISSAL.

For the first time in this case, the CIA Director argues before this Court that section 102(c) of the National Security Act wholly insulates his employment determinations from court review. He claims that his decision to fire an employee—even in violation of the employee's constitutional rights—is exempt from judicial scrutiny.

In the courts below, the CIA Director expressly disavowed the radical theory he now urges on certiorari.[4] His counsel told the district court that "the Director makes no assertion that the statute under which he acted insulates him from the Constitution." Transcript of Argument at 51 (Feb. 25, 1983).[5] In the court of appeals, "[g]overnment counsel conceded at oral argument that the agency was *not* prepared to say that constitutional claims . . . are precluded from review." *Doe*

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[4] Although his certiorari petition did argue that "[s]ection 102(c) [of the National Security Act] . . . does not distinguish between constitutional and nonconstitutional claims," Petition at 23, even before this Court the Director has otherwise sought to camouflage the nature and scope of the ruling he seeks. He has done this both by ignoring the full range of constitutional and statutory claims that his theory would withdraw from court review (*compare* Petitioner's Brief at 33-45 *with* discussion *infra* at 17-24) and by belittling the strength of the constitutional claims that Doe seeks to litigate (*compare* Petitioner's Brief at 27-28 n.23 with discussion *infra* at 24-29).

[5] *See also id.* at 37 ("The statutes applicable to the Director's authority certainly do not give him the power to act unconstitutionally"); *id.* at 38 ("Now it would be possible I suppose for a particular plaintiff to raise a claim which would introduce constitutional issues that would have to be resolved by the Court.").

v. Casey, 796 F.2d 1508, 1518 (D.C. Cir. 1986) (emphasis added).[6]

Reversing his position in this Court, the CIA Director asserts in a highly abstract fashion that unparticularized national security interests justify the draconian measure of refusing even constitutional litigants a judicial forum for their claims. Because the Director repudiated that theory in the lower courts, it is not posed with clarity or precision now.[7] This Court should therefore decline to address the Director's belated claim of exemption[8] and

[6] This Court has, of course, traditionally refused to consider constitutional questions not pressed in the courts below. *E.g., Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (dismissing writ of certiorari as improvidently granted where broad constitutional questions were not raised below; holding that this Court "cannot decide issues raised here for the first time"); *see also Illinois v. Gates*, 462 U.S. 213, 221-22 (1983) (discussing scope and rationale of the "not pressed or passed upon below" rule). Because the CIA Director has not properly preserved his claim of exemption, the Court should decline to address it.

[7] The Court frequently has dismissed writs of certiorari where, as here, a constitutional question is not presented with clarity or precision. *E.g., Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (certiorari dismissed because "the record is not sufficiently clear and specific to permit decision of the important constitutional questions involved"); *Johnson v. Massachusetts*, 390 U.S. 511, 511 (1968) (certiorari dismissed because "the record relevant to the constitutional claims now asserted is insufficient to permit decision of those claims"); *Wainwright v. City of New Orleans*, 392 U.S. 598, 598-99 (1968) (per curiam) (certiorari dismissed because "the dispositive constitutional issues in this case are not adequately presented by the record"); *Kimbrough v. United States*, 364 U.S. 661, 661 (1961) (certiorari dismissed because the constitutional question "is not presented with sufficient clarity"). The Court also has declined to exercise its jurisdiction when a constitutional question is presented "in highly abstract form." *Rescue Army v. Municipal Court*, 331 U.S. 549, 575 (1947).

[8] Seizing upon this dispute to decide the issue urged by the CIA Director would also contravene the policy of strict necessity in disposing of constitutional issues. As Justice Rehnquist wrote, "[w]here difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary

dismiss the writ of certiorari as improvidently granted.[9]

II. THE DIRECTOR'S ATTEMPT TO PRECLUDE ALL JUDICIAL REVIEW OF CONSTITUTIONAL CLAIMS SEEKS TO PLACE HIS PERSONNEL DECISIONS ABOVE THE LAW AND, IF SUCCESSFUL, WOULD CURTAIL UNJUSTIFIABLY THE CONSTITUTIONAL RIGHTS OF THOUSANDS OF GOVERNMENT WORKERS AND RECIPIENTS OF FEDERAL BENEFITS.

The CIA Director asks this Court to hold that section 102(c) of the National Security Act bars all judicial review of his employment determinations.[10] The Director

limitations on our discretion. By doing so, we 'promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions.'" *Illinois v. Gates*, 462 U.S. 213, 224 (1983) (quoting *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting)).

[9] At a minimum, the policy of strict necessity in disposing of constitutional questions militates in favor of a full briefing and consideration of the cross-petition filed by Doe prior to any action on the issues posed here. The far-reaching constitutional issues urged upon this Court by the Director would be mooted if the Court decided the nonconstitutional claims to procedural protections raised by the cross-petition in Doe's favor.

[10] The mere presence in a case of the question whether a statute precludes all judicial review of a constitutional claim supplies a compelling reason to find that statutory review is available. *See Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2141 n.12 (1986) (importance of avoiding the "serious constitutional question" whether 42 U.S.C. § 1395ii precludes judicial review of constitutional claims arising under Part B of the Medicare program supported the Court's statutory construction); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974) (finding that 38 U.S.C. § 211(a) did not preclude all judicial review of veterans' benefit legislation is buttressed by the fact that "[s]uch a construction would, of course, raise serious questions concerning the constitutionality of § 211 (a)"); *see also Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (interpretation accorded the statute at issue in *Robison* was "expressly based, at least in part, on the fact that if § 211(a) reached constitutional challenges to statutory limitations, then absolutely no judicial consideration of the issue would

does not merely seek a ruling that Congress has precluded federal court review of a constitutional claim and left the state courts open. Doe and others in his position can obtain a remedy in federal court or not at all.[11] Thus, the result the Director seeks goes far beyond the court-stripping bills debated in Congress over the last fifteen years.[12] Nor is the issue simply whether Congress can specifically limit this Court's own jurisdiction over a certain class of cases or subject matter.[13] If the Director is correct, Congress has not merely attached conditions to Doe's ability to obtain review of his discharge or relegated him to a special or particular federal court.[14]

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be available"). The availability of APA review is addressed by respondent; *amici curiae* do not repeat those arguments here.

[11] The Director appears to concede that Doe cannot obtain relief in state court, as he asserts that Doe's only remedy is through "[c]ongressional inquiry and oversight, criticism from other Executive Branch officials, and dismissal of the Director from office." Petitioner's Brief at 44. Doe could not, for example, bring a suit for wrongful discharge in state court alleging that his firing violated the federal constitution and seeking reinstatement. Regardless of whether the state court would have jurisdiction to entertain such a suit, it could not issue an injunction against the Director. *See, e.g., Kennedy v. Bruce*, 298 F.2d 860 (5th Cir. 1962); *Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd per curiam sub nom. Dinkens v. Attorney General*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961); *see also* M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 116-24 (1980) (discussing power of state courts to control federal officers).

[12] Most, if not all, efforts aimed at eliminating jurisdiction for certain classes of cases sought either to deny review by this Court or to eliminate the jurisdiction of all federal courts. *See generally* Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. 129, 129 n.1 (1981) (summarizing proposed court-stripping bills).

[13] *Cf. Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). However, because the Director asserts that Congress has barred all judicial review, this Court's appellate jurisdiction would, of course, be eliminated. *See infra* at 16-17.

[14] *See Yakus v. United States*, 321 U.S. 414 (1944).

Rather, if his view is adopted, then no court is available to review a claim of constitutional violation.[15] Quite starkly, the Director asks this Court to hold that a congressional enactment may be interpreted to preclude a litigant from obtaining any hearing on a claim that a highly placed member of the Executive Branch has violated the Constitution.

As *amici curiae* demonstrate below, several independent constitutional requirements compel the conclusion that all judicial scrutiny of constitutional claims cannot be barred. This conclusion is so self-evident that courts and legal scholars alike have found it unnecessary to elaborate its bases. It stems, however, from the central principles of our constitutional framework.

Amici curiae also show that the CIA Director seeks an unprincipled exemption from judicial scrutiny that would give him limitless power over CIA personnel. Although the Director seeks to disguise the scope of the ruling he seeks, the Director's theory would sweep away all the constitutional and statutory guarantees that accord basic employment protections to CIA employees and others similarly situated. Further, *amici curiae* show that, contrary to the Director's suggestion, the rights that *this* plaintiff seeks to vindicate have solid constitutional underpinnings. By attacking the strength

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[15] Thus, the Director's interpretation of the National Security Act would require clear and convincing evidence that Congress intended to preclude not only review under the APA, but all review of constitutional claims. *See Johnson v. Robison*, 415 U.S. 361, 373-74 (1974); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). The Director, however, has not even acknowledged his burden in this respect, and thus has adduced no evidence of a specific congressional intent to bar judicial review of constitutional claims. As *amici curiae* demonstrate below, even if a specific congressional intent could be established (which it cannot), the Director's theory could not be upheld because the due process clause, separation of powers principles, and Article III of the United States Constitution all prohibit withdrawal of judicial review of the core class of cases over which the Director seeks unfettered discretion.

of the constitutional claims that Doe asserts, the Director again seeks to camouflage the threat to fundamental employment protections posed by his claim of exemption from judicial review.

A. The Fifth Amendment Due Process Clause, the Separation of Powers Doctrine, and Article III of the Constitution Independently Foreclose the Director's Attempt to Exempt His Decisions From Judicial Scrutiny.

(i) *The Due Process Clause.*

A limitation on judicial review that denies access to scrutiny of constitutional claims by any court violates the fifth amendment due process clause. "When dealing with constitutional rights . . . there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring). Congress may not deny a litigant "the independent judgment of a court on the ultimate question of constitutionality." *Id.* at 84.[16]

On this basis, *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948), struck down Congress' attempt to preclude all court review of challenges to the Portal-to-Portal Act. In that Act, Congress specifically had provided that "[n]o court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding" to enforce certain federally mandated wage standards.[17] The Second Circuit found this limitation contrary to the fifth amendment:

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[16] *See also Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("under certain circumstances, the constitutional requirement of due process is a requirement of judicial process").

[17] 29 U.S.C. § 252(d).

> We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts . . . , it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law.

Battaglia, 169 F.2d at 257 (footnote omitted). Recently, in *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia Circuit unhestatingly endorsed the conclusion in *Battaglia*. *Bartlett* found it "obvious" that Congress could not foreclose all judicial review of a constitutional claim arising under the Medicare Act because "there is a due process right to have the scope of constitutional rights determined by some independent judicial body." *Id.* at 706.[18]

These judicial pronouncements accord with the views of legal scholars. Professor H.M. Hart, among the most respected and perceptive commentators on federal jurisdiction, took it as an article of faith that some court, state or federal, had to be available to vindicate federal constitutional rights. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953). Other commentators have found this principle to be so self-evident as to warrant only passing mention.[19]

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[18] The Court of Appeals for the District of Columbia Circuit recently vacated its order granting rehearing *en banc* in *Bartlett*, sparking dissents from some members of the court. None of the dissenting judges, however, took issue with the panel majority's conclusion that the due process clause and the separation of powers doctrine require judicial review of constitutional claims. Those opinions are concerned principally with the panel's statutory analysis and the judicial administration concerns inherent in the decision to grant rehearing *en banc*.

[19] *See, e.g.*, M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* at 27 ("a limitation on the jurisdiction of *both* state and federal courts to review the constitutionality

A similar approach has been taken by this Court, which, without elaborate discussion, has endorsed Professor Gunther's conclusion that "all agree that Congress cannot bar all remedies for enforcing federal constitutional rights." *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2141 n.12 (1986) (quoting Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 921 n.113 (1984)). This basic principle is challenged by the CIA Director's position here.

The Director argues that "[c]ongressional inquiry and oversight, criticism from other Executive Branch officials, and dismissal of the Director from office" provide substitutes for judicial review. Petitioner's Brief at 44. Even if available, these political routes hardly provide the same level of due process protection as regularized, independent judicial review. Moreover, justice for those with the resources and influence to manipulate the political process cannot be compared to a guarantee of access to the courts for all who seek redress for injury to their constitutional rights. The Director's suggested alternate avenues of "redress" would discriminate against the very parties to which the Court has sought to extend increased protection. "Discrete and insular minorities"

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of federal legislation or the acts of federal or state officials would be held unconstitutional"); Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1034 (1982) (Congress cannot deprive state and federal courts of jurisdiction in order to foreclose judicial review); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 80-84 (1981) (Congress must either provide judicial review through state or federal courts or allow state relief against federal officers); Symposium Proceedings: *Congressional Limits on Federal Court Jurisdiction*, 27 Vill. L. Rev. 1042, 1045-46 (1982) (comments of Prof. Ratner) ("[t]here must be some tribunal in which you can assert [a] constitutional claim . . . the due process clause requires that there remain a tribunal available in which you may be heard") (footnote omitted).

often lack access to the political process and, left to the avenues of review proposed by the Director, could not obtain redress. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).[20]

(ii) *The Separation of Powers Doctrine.*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), established "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see also United States v. Nixon*, 418 U.S. 683, 703 (1974). As this Court recently reiterated, "the judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced." *Davis v. Passman*, 442 U.S. 228, 241 (1979). Our constitutional framework presumes that "justiciable constitutional rights are to be enforced through the courts." *Id.* at 242. Without judicial review, constitutional rights would become "merely precatory." *Id.*[21]

Congress cannot control federal jurisdiction in a fashion that encroaches on the courts' independent duty to carry out their constitutional function. *See* M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judi-*

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[20] Indeed, Doe, the discharged employee in this case, is unlikely to be able to take advantage of the types of review posited by the Director. "[P]ervasive discrimination against gay people has seriously impaired their ability to gain a politically viable voice for their views in state and local legislatures and in Congress." *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 2 Indiv. Empl. Rts. Cas. (BNA) 633, 639 (N.D. Cal. 1987).

[21] As Professor Tribe has argued, the existence of an independent judiciary has played an inestimably large role in molding the society we inhabit. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. at 131. The independence of the judiciary not only provides a direct check on the other branches of government, but it also "lends an otherwise unavailable legitimacy to Congress." *Id.* In countries without an independent judiciary, Tribe notes, the legislature has been able to " 'ride roughshod over individual liberty.' " *Id.* (quoting J. Dugard, *Human Rights and the South African Legal Order* 35 (1978)).

cial Power at 29. This Court recently declared that: "To . . . maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded." *INS v. Chadha*, 462 U.S. 919, 957-58 (1983). As Attorney General William French Smith argued in opposing recent court-stripping bills: "Essential to the principle of separation of powers was the proposition that no one Branch of Government should have the power to eliminate the fundamental constitutional role of either of the other Branches." [22]

If, as the government now argues, the CIA Director's hiring decisions are wholly exempt from judicial scrutiny, then Congress has delegated to an Executive Branch member the unreviewable power to judge the constitutionality of his own actions, and thereby deprived the federal courts of their "traditional role . . . to interpret the law." *Powell v. McCormack*, 395 U.S. 486, 548 (1969). Doe's claim would, in effect, be "adjudicated" by the CIA Director.

Such a result violates the presumption of judicial review, which applies "in the absence of 'a textually demonstrable *constitutional* commitment of [an] issue to a coordinate political department.'" *Davis v. Passman*, 442 U.S. at 242 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (emphasis added). Moreover, the judicial function vested in the federal courts "can no more be shared with the Executive Branch than the Chief Executive . . . can share with the Judiciary the veto power." *United States v. Nixon*, 418 U.S. at 704. Thus, contrary to established doctrine in this Court, the Director's approach would undermine the co-equal status of the judiciary by eliminating court review of a class of cases implicating a core constitutional function of the Third Branch.[23]

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[22] Letter from William French Smith to Senator Strom Thurmond (May 6, 1982), *reprinted in* 128 Cong. Rec. 9,093, 9,095 (1982).

[23] *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987), employed the separation of powers doctrine to buttress its decision that Congress could not preclude judicial review of constitutional claims under the Medicare Act. Acknowledging that some political questions are usually committed to the other branches for resolution, the court declared that:

> it is quite another matter to suggest that Congress may, as it sees fit, act to bar all courts from considering the constitutionality of a legislative act. If Congress attempts to go this far, it has 'passed the limit which separates the legislative from the judicial power.'

Id. at 707 (quoting *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872)).

The framers' vision of the judiciary's role reinforces the conclusion that the Director's approach invades the proper province of the courts. In the First Congress, James Madison presented the Bill of Rights with these words:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 Annals of Cong. 439 (1789), *quoted in Davis v. Passman*, 442 U.S. at 241-42. In The Federalist No. 78, Hamilton warned that because the judiciary is the weakest branch, "all possible care is requisite to enable it to defend itself against [the] attacks" of the other branches. Further, the "complete independence of the courts of justice is peculiarly essential" under a constitution that contains limitations on the powers of the legislature. "The interpretation of the laws is the proper and peculiar province of the courts." *The Federalist No. 78*, at 394-95 (A. Hamilton) (G. Wills ed. 1982).

The judiciary's power to protect individual constitutional rights is directly at stake in Doe's case. Precluding judicial review here would leave a violation of constitutional rights unredressed. On one occasion, such a

deprivation may not disrupt the fabric of the republic. The CIA Director, however, asserts an argument of expansive scope and dangerous implications. Its endorsement in this case threatens the rights of all who have come to rely on the federal courts as protectors against discrimination. As *Marbury v. Madison* and the framers' writings demonstrate, the essence of the judiciary's role is to review government action that invades individual liberties. The legislative or executive branches cannot provide a substitute for judicial review consistent with the separation of powers, and the CIA Director's attempt to argue to the contrary only highlights the extent to which he seeks to usurp the powers of the judiciary.

(iii) *Article III.*

Article III of the Constitution provides a third limitation on Congress' power to withdraw judicial review of Doe's claims. By precluding all review of Doe's constitutional claims, section 102(c) necessarily would bar this Court from reviewing the legality of the Director's action. Article III, section 1 provides that "[t]he judicial Power of the United States shall be vested in one supreme Court." Further, Article III, section 2 states that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution" and that, in cases not within the Court's original jurisdiction, "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact." Although the "exceptions" clause that follows gives Congress some power to limit this Court's jurisdiction, most commentators in the recent debates over court-stripping bills agreed with Professor Hart's conclusion that "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. at 1365.[24]

[24] In 1982, the Attorney General of the United States himself endorsed this view. In a letter to the Chairman of the Senate Judiciary Committee, William French Smith asserted that Congress may not "make 'exceptions' to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers." Letter from William French Smith to Senator Strom Thurmond (May 6, 1982), *reprinted in* 128 Cong. Rec. 9,093, 9,093 (1982); *see also* Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.-C.L. L. Rev. at 135 (endorsing Hart's conclusion).

As *Marbury v. Madison* and *Cooper v. Aaron* establish, cases in which individuals seek to protect their constitutional rights constitute a major part of the Court's "essential" role. *See Marbury v. Madison*, 5 U.S. (1 Cranch) at 163 ("[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury"). Indeed, in *Crowell v. Benson*, 285 U.S. 22, 60 (1932), this Court echoed the Constitution's language in defining its role, stating that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

The CIA Director's argument would bar this Court from exercising appellate jurisdiction over all cases, like Doe's, in which the constitutional rights of employees in positions affected with the national security are at stake. Removal or "exception" of this core class of cases from the Supreme Court's jurisdiction would violate the mandate of Article III.

B. The Broad Scope of the Director's Argument Threatens All Constitutional and Statutory Employment Protections.

The CIA Director camouflages the nature and scope of his argument by invoking unparticularized national security interests. He attempts to pose these national security concerns as a counterweight to the constitutional rights of Doe and other potential litigants. Under the rubric of national security interests, the Director also attempts

to reassure the Court that he seeks a narrowly limited decision in an area of significant government concern. In fact, quite the opposite is true.

Most fundamentally, the Director disguises the enormity of the power he seeks. The Director asks this Court to give him unfettered discretion to make personnel decisions for whatever reason he chooses, no matter how offensive, or for no reason at all.[25] Future situations (there would be no future cases) thus could involve discharges that go far beyond Doe's individual constitutional rights. As the court of appeals observed in deciding whether section 102(c) precluded judicial review under the APA, if the Director prevails, CIA employees could be terminated "simply because they are Black, . . . simply because they are female, or even, . . . simply because they are blonde." 796 F.2d at 1517-18.

Furthermore, the CIA Director seeks to overturn existing law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-16. Title VII encompases and expands upon the protections against discrimination on the basis of race, color, religion, sex, and national origin afforded by the Constitution. *See Kizas v. Webster*, 707 F.2d 524, 542 (D.C. Cir. 1983). For federal employees, Title VII affords an exclusive but direct route to judicial review of discrimination prohibited under both its own terms and the Constitution, and thus "comprehensively protect[s] . . . against federal employment discrimination." *Id.* at 543. In the past, the Director routinely has defended Title VII actions brought by CIA employees and federal courts have never hesitated to adjudicate

[25] The CIA Director asserts that exempting his employment determinations from all judicial scrutiny does not offend the Constitution because it "does not use an invidious characteristic" or victimize "a discrete and insular minority." Petitioner's Brief at 34 n.31. However, if the Director's argument is accepted, then he may use any characteristic he chooses as a basis for personnel decisions and may persecute anyone, whether a member of a minority group or not, for any reason as long as he asserts that his decision is in the interests of the United States.

them.[26] Now, however, the Director seeks to foreclose all avenues to judicial review of his personnel decisions, a result that necessarily would eliminate relief under Title VII. As with his assertion that review of all constitutional claims is barred, the Director cites no evidence that Congress intended to exempt the CIA from actions brought under Title VII.

Insulating CIA employment determinations from all court scrutiny would also permit first amendment activities, minor political disagreements, union organization, or other factors equally unrelated to job performance or national security to form the basis for personnel actions. In an atmosphere fostered by absence of judicial review, such invidious decisions by lower-level administrators could be ignored or rubber-stamped by the Director and his immediate staff. Indeed, since the Director would not be held accountable for *any* action taken against an employee, the basis for a given decision would never be known.

Not only would the Director's argument give him unreviewable power over CIA employees and eliminate the protections accorded by the Constitution and statutes such as Title VII, but it would also provide a rationale for similar exemptions also based on the national security interests throughout the federal government and in the private sector.[27] Civilian employees in the National

[26] *See, e.g., Weber v. Turner*, 92 F.R.D. 749 (D.D.C. 1981); *Turbeville v. Casey*, 525 F. Supp. 1070 (D.D.C. 1981); *Neely v. CIA*, 27 Fair Empl. Prac. Cas. (BNA) 82 (D.D.C. 1981); *Brown v. Turner*, 490 F. Supp. 939 (D.D.C. 1980), *aff'd*, 659 F.2d 1199 (D.C. Cir. 1981). Indeed, the CIA Director concedes that "courts have reviewed certain of the Director's personnel actions under" Title VII. Petitioner's Reply Memorandum at 7. The Director has been able to respond to the complaints in these cases without jeopardizing the national security. As *amici curiae* show *infra* at p. 23, and as the district court found, judicial review of Doe's claims does not threaten national security either. *See Doe v. Casey*, 601 F. Supp. 581, 589-90 (D.D.C. 1985).

[27] The Director appears to concede that the scope of his argument extends far beyond the CIA. In summarizing his argument,

Security Agency ("NSA"), branches of the military and other defense department positions, as well as large proportions of the workforce in the Departments of Justice and State and other federal agencies, must obtain security clearances as a prerequisite to employment. In fact, of the 5.3 million federal employees outside of the CIA and the NSA, 2.2 million are required to maintain security clearances.[28] In addition, 1.4 million private sector employees who work for government defense contractors are required to maintain security clearances.[29] The Director's pervasive national security rationale presumably would encompass all of these employees, a significant proportion of the total United States workforce, and thus render their employment subject to the whim, caprice or prejudice of their supervisors.[30]

The Director's approach, moreover, opens the door to preclusion of judicial review of constitutional claims even beyond those brought by employees in jobs affected with the national security interest. Courts have found numerous governmental interests to be sufficiently "compelling," "substantial" or "important" to justify some

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the Director states that "judicial review of *national security dismissals* must be deemed precluded." Petitioner's Brief at 44 (emphasis added). Moreover, the Director argues that the National Security Act must be viewed in the context of statutes regulating the Department of Defense and other agencies, thus suggesting that his rationale would apply with equal force in these contexts. *See id.* at 24-27.

[28] General Accounting Office, *Information and Personnel Security* 11 (Sept. 1986).

[29] *Id.*

[30] Doe's own case illustrates the broad ramifications of the CIA Director's employment decisions as to CIA employees alone. The CIA has told Doe that he will have to inform the Agency if he seeks any job requiring a security clearance and that the Agency will inform his prospective employer that Doe is a threat to security. Doe thus is personally foreclosed from literally millions of jobs.

restriction on constitutional rights.[31] Presumably, Congress could determine that each such interest overrides the constitutional mandate for judicial review. Many existing and future statutory schemes—and the federal entities and programs they create—could be wholly insulated from scrutiny. Thus, even if the Court confined its decision to the facts before it in this case, the door would be open to much wider application.[32]

Although the danger that Congress may enact legislation precluding judicial review in all these situations may seem remote, history teaches that it is not unreasonable to fear this result. Congress has been prompted to extreme measures by exigent circumstances and demagogues in the past. Governments have come to power by playing on people's prejudices. This very danger prompted the framers to create an independent judiciary. As Hamilton wrote in The Federalist No. 78:

> [The] independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

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[31] *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (government's interest in efficient administration of immigration laws found "weighty"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (city's interest in attempting to preserve the quality of urban life "must be accorded high respect"); *see also Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (discussing government interests in first amendment litigation).

[32] The Director's attempt to limit the scope of the decision he seeks cannot be reconciled with the government's position in other cases. In *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987), for example, the government apparently argued that a section of the Medicare Act precluded all judicial review of certain constitutional claims.

The Federalist No. 78, at 397 (A. Hamilton) (G. Wills ed. 1982).

The circumstances of Doe's discharge vividly illustrate the importance of the judiciary's intended role in protecting the individual against inflamed and discriminatory government action. The Director fired Doe after he passed a polygraph examination that seemingly dispelled any suggestion that he had been disloyal or that his homosexuality posed a threat to national security. The CIA refused to give Doe a written statement of reasons, and in fact provided contradictory statements of CIA policy regarding homosexuality. Without judicial review, there is no guarantee that employment determinations like Doe's discharge will be attended by procedural regularity and supported at least by a rational basis in fact. Court scrutiny is especially crucial where, as here, the terminated employee is part of a group subject to unreasoned prejudice and discrimination.[33]

The Director's citation-studded discussion seems intended to pit the national security interest against the fundamental right of access to the courts. His brief, in fact, asserts that the government's interest in national security, as determined exclusively by him, should "prevail" over the individual's ability to vindicate his or her rights through the judicial process. *See* Petitioner's Brief at 44. To buttress this argument, the Director relies on the now rejected notion that government employment is a privilege that may be withdrawn at the executive's caprice. The CIA Director thus seeks an avowedly utilitarian result, under which the rights of

[33] Court scrutiny of governmental decisions for constitutional or procedural infirmity is particularly critical in times of political turmoil or hostility. *See Korematsu v. United States*, 323 U.S. 214 (1944) (upholding curtailment of civil rights of citizens of Japanese ancestry during World War II); *see also Service v. Dulles*, 354 U.S. 363, 387 (1957) (Executive Branch member must abide by validly promulgated regulations in discharging employee for alleged disloyalty; stressing need for procedural regularity during the "red scare").

the few are eviscerated by the unsupported assertion that the national security is at stake.

National security is not irreconcilable with judicial review for individual rights and should not be weighed against the availability *vel non* of judicial review. Doe seeks an independent court appraisal of his discharge, not an unrestrained or wholesale inquiry into the CIA's workings. Should balancing of the national security against Doe's rights become necessary,[34] that balancing is the task of the courts. The judiciary is not without the wherewithal to protect national security. A federal court may limit the scope of Doe's inquiry or conduct an *in camera* examination of evidence. The Director also may invoke the state secrets privilege to protect confidential information in a given case. In addition, CIA regulations limit the information that may be disclosed in litigation.[35] By simply reciting the fact that the government has a general interest in national security, the CIA Director should not be permitted to usurp the judiciary's essential function in weighing potentially competing constitutional interests.[36]

[34] In this case, the district court expressly found that the record was devoid of any suggestion "that overriding national security concerns are at stake or that affording the plaintiff Doe the relief he seeks might disclose matters that would place at risk such concerns and interests." *Doe v. Casey*, 601 F. Supp. 581, 589-90 (D.D.C. 1985).

[35] For example, Doe has not revealed his true name and status at the CIA because CIA regulations forbid him from divulging this information.

[36] In his petition for certiorari, the CIA Director noted that "the Constitution itself provides for suspension of the writ of habeas corpus when 'in Cases of Rebellion or Invasion the public Safety may require it.'" Petition at 24 n.20 (quoting U.S. Const. art. I, § 9, cl. 2). Significantly, the Constitution does not provide for suspension of a constitutional litigant's due process right to court review, of the check and balance of the separation of powers, or of the essential functions of the courts as described in article III whenever an employee in a job affected with the national security interest seeks to vindicate his or her rights.

The Director asserts, without any factual support, that national security justifies refusing a constitutional litigant his or her day in court. The Director's argument itself illustrates starkly the danger of permitting him to usurp the judiciary's role. If his judgment is that the mere invocation of the words "national security" should bar judicial review of constitutional claims, without any showing of a threat to national security and absent any consideration of the importance of competing individual rights, then the need for a check on his authority is plain.

C. This Plaintiff's Privacy and Equal Protection Claims Implicate Significant Constitutional Interests.

The CIA Director also seeks to make his claim of exemption from judicial review more palatable by attacking the strength of *this* plaintiff's constitutional interests. Contrary to the Director's suggestion, however, the constitutional privacy and equal protection issues that Doe seeks to litigate are important, unresolved ones. Although those claims are not before this Court on certiorari,[37] the CIA Director implies that their constitutional underpinning is only "arguable" in light of this Court's decision in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). Petitioner's Brief at 27-28 n.23. *Hardwick*, however, ruled only on a privacy claim that certain acts between

[37] The question before this Court on certiorari is not whether and to what extent Doe's constitutional privacy and equal protection rights have been violated. *See* Petition at 25 n.21 (government admits that it did not pose that question on certiorari); Sup. Ct. R. 21. Indeed, the most basic principles of litigation fairness preclude the government from expanding the questions raised in its petition to include issues neither decided in the courts below, nor fully briefed by the litigants to any court, including this Court. Nevertheless, to illustrate why the CIA Director's characterization of Doe's claims is fundamentally inaccurate, *amici curiae* outline briefly the interests at stake in Doe's underlying constitutional claims. Although *amici curiae* seek to highlight some considerations relevant to those issues, this brief cannot substitute for a fully developed factual record.

consenting adults should be insulated from criminal prosecution. 106 S. Ct. at 2846 n.8. It did not address at all the question of discrimination, whether because of conduct or status, and does not resolve either the privacy or the equal protection claims raised by Doe.

Doe's privacy claim cannot be disposed of summarily by reliance on *Hardwick*, as the government implies. *Hardwick* held only that the constitutional privacy right does not encompass the freedom of homosexuals to engage in what the Georgia statute defined as sodomy. It did not address other sexual conduct. As post-*Hardwick* decisions in the lower federal courts have emphasized, "[n]one of the fifty states outlaws the act of two people of the same sex kissing one another, holding hands together, or caressing each other." *High Tech Gays*, 2 Indiv. Empl. Rts. Cas. (BNA) at 641. In this case, although Doe alleged that he engages in "homosexual activities,"[38] there is no record as to the nature of the conduct that the CIA would rely upon to justify his discharge. Without a developed record, Doe's privacy claim —even to the extent it encompasses same-sex affectional conduct—cannot be resolved. Certainly at some level, "[t]he freedom to express physically . . . basic human emotions and feelings is 'implicit in the concept of ordered liberty' . . . [and] 'deeply rooted in this Nation's history and tradition.'" *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) and *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (Opinion of Powell, J.)).

Moreover, the gravamen of Doe's privacy claim implicates homosexual identity as much as discrete sexual acts.[39] A sense of homosexual identity may be expressed in a variety of ways that implicate both the intimate and

[38] Complaint at 2; Joint Appendix at 6.

[39] The court of appeals noted that *Hardwick* plainly does not resolve claims based merely on homosexual orientation, as opposed to homosexual conduct. *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986).

public aspects of associational interests recognized by this Court. "[H]ighly personal relationships" and "certain kinds of personal bonds" are vital to the "ability independently to define one's identity." *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984). Highly personal relationships, which may exist without sexual activity, as well as more public associations, such as participation in social or political organizations,[40] trigger additional privacy-based concerns not resolved by *Hardwick*.

Even more obviously, *Hardwick* does not dispose of Doe's equal protection claim, which stands on an independent footing. Many of the characteristics prompting heightened scrutiny of equal protection claims raised by other groups are shared by lesbians and gay men.[41] At

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[40] *See, e.g., Olivieri v. Ward*, 801 F.2d 602 (2d Cir. 1986); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984), *aff'd per curiam by an equally divided Court*, 470 U.S. 903 (1985); *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980), *cert. denied*, 455 U.S. 909 (1982); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir.), *cert. denied*, 434 U.S. 1080 (1977); *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632 (D.R.I. 1976).

[41] For example, although the "cause" of homosexuality is in dispute, many consider it to be an immutable characteristic over which the individual has no control. *See Baker v. Wade*, 553 F. Supp. 1121, 1129 (N.D. Tex. 1982). Moreover, "homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality." *Rowland v. Mad River Local School District*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)). "In addition, the pervasive discrimination against gay people has seriously impaired their ability to gain a politically viable voice for their views in state and local legislatures and in Congress." *High Tech Gays*, 2 Indiv. Empl. Rts. Cas. (BNA) at 639. In short, the claim that homosexuals qualify as a "suspect class" for purposes of equal protection analysis has substantial force.

a minimum, the Director's suggestion that Doe lacks any constitutional claim is patently wrong because Doe may rely on the equal protection clause's requirement of at least a rational basis for government action against homosexuals. "Homosexual conduct may not be protected under the right of privacy, and homosexuals may not qualify as a suspect class. Nonetheless, the government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all." *Swift v. United States*, 649 F. Supp. 596, 602 (D.D.C. 1986); *cf. United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

Federal courts long ago adopted the principle, grounded in the due process clause, that a federal employee could not be fired because of private homosexual conduct, even if criminal, unless such conduct were shown to have a connection or effect on job performance. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973). These rulings formed the basis for a Civil Service Commission directive requiring that a person may not be found unsuitable for federal employment "merely because that person is a homosexual or has engaged in homosexual acts." Civil Service Bulletin, Dec. 21, 1973, *quoted in Ashton v. Civiletti*, 613 F.2d 923, 927 (D.C. Cir. 1979).

Although CIA employees are excepted from the civil service system, in the closely analogous area of security clearances, the government has eschewed a blanket policy of firing homosexuals. The Department of Defense considers openness about homosexual conduct to be a mitigating factor, if the conduct "can no longer form the basis for vulnerability to blackmail, coercion or pressure." Department of Defense Personnel Security Program Regulation, 52 Fed. Reg. 11,219, 11,254 (Apr. 8, 1987).

Homosexuals who meet this criteria are granted security clearances [42] because they are not considered susceptible to blackmail.[43]

On remand in this case, the district court has been directed to determine whether the CIA has a blanket policy of firing all homosexuals. If such a policy does exist, the lower court would then have to consider whether a sufficiently rational connection exists between homosexuality and job performance to justify such a total and irrebuttable exclusion. Even under a rational

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[42] *See generally* Williams, *Pentagon Asking Employees About Sex Practices*, N.Y. Times, May 14, 1987, at A18; Rice, *Lesbian Fights Demotion by Defense Department*, The [San Francisco Legal] Recorder, May 8, 1987, at 1 (quoting Pentagon spokesperson as saying, "[w]e clear homosexuals year in and year out"); Getler, *Homosexual to Keep High-Security Job*, The Washington Post, Dec. 30, 1980, at A1. In a settlement agreement nearly a decade old, the Department of the Army agreed not to deny security clearances to civilian defense contract employees on the basis of homosexuality alone. *Preston v. Brown*, No. C-80-0994 (N.D. Cal. Aug. 10, 1980), reported in N.Y. Times, Nov. 16, 1980, at 60. *Accord Swift v. United States*, 649 F. Supp. 596 (D.D.C. 1986) (denying motion to dismiss claims for violation of privacy, associational and equal protection rights by White House stenographer who lost security clearance on grounds of homosexuality); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 2 Indiv. Empl. Rts. Cas. (BNA) 633 (N.D. Cal. 1987) (Defense Department policy of subjecting gay applicants to more extensive investigations for security clearances than heterosexual applicants, even if clearances are eventually granted, violates equal protection clause).

[43] The increasing number of homosexuals who, like Doe, are not susceptible to extortion, combined with concern about actual breakdowns in security, have prompted calls for a more realistic assessment of factors linked to security risks. One Congressional staff study recommends eliminating any differential treatment between homosexual and heterosexual applicants.

> Before an individual is cleared, a full background investigation should be conducted, but greater attention should be paid to factors such as financial mismanagement and instability, which have been shown to be good predictors of potential spies and less attention to life style, politics or organizational affiliations . . . . The fact is that there appears to be no evidence that . . . admitted homosexuality poses any greater security risk than . . . active heterosexuality.

Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, and Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, *Preliminary Joint Staff Study on the Protection of National Secrets* 12-13 (Oct. 25, 1985).

basis test, the government's ability to justify a blanket exclusion of homosexuals from CIA employment is highly questionable, given the admitted absence of, and lack of need for, such a policy in other employment touching on security concerns.

Doe's equal protection and privacy claims raise many important constitutional questions that survive this Court's decision in *Hardwick*. The Director's suggestion that Doe lacks any constitutional basis to challenge his discharge is so plainly wrong that it must be viewed as an attempt to disguise the seriousness of the Director's claim of exemption from judicial review. The Director's theory, however, would deny Doe, and all other litigants, a court forum for constitutional claims.

CONCLUSION

For the reasons set forth above, the Court should dismiss the writ of certiorari as improvidently granted. In the alternative, if the Court reaches the merits, the Court should hold that the National Security Act does not and, under our constitutional system, could not bar all judicial review of employment determinations made by the CIA Director.

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November 3, 1987